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DECISIONS

OF THE

DEPARTMENT OF THE INTERIOR

IN CASES RELATING TO

THE PUBLIC LANDS

EDITED BY

DANIEL M. GREENE

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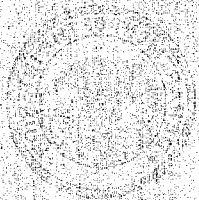
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- Central Pacific R. R. Co. *v. Orr* (2 L. D., 525); overruled, 11 L. D., 445.
- Centerville Mining and Milling Co. (39 L. D., 80); no longer controlling, 48 L. D., 17.
- Chappell *v. Clark* (27 L. D., 334); modified, 27 L. D., 532.
- Chicago Placer Mining Claim (34 L. D., 9); overruled, 42 L. D., 453.
- Childress *et al. v. Smith* (15 L. D., 89); overruled, 26 L. D., 453.
- Christofferson, Peter (3 L. D., 329); modified, 6 L. D., 284, 624.
- Clafin *v. Thompson* (28 L. D., 279); overruled, 29 L. D., 693.
- Claney *v. Ragland* (38 L. D., 550); see 43 L. D., 486.
- Cline *v. Urban* (29 L. D., 96); overruled, 46 L. D., 492.
- Cochran *v. Dwyer* (9 L. D., 478); see 39 L. D., 162, 225.
- Colorado, State of (7 L. D., 490); overruled, 9 L. D., 403.
- Cook, Thomas C. (10 L. D., 324); see 39 L. D., 162, 225.
- Cooke *v. Villa* (17 L. D., 210); vacated, 19 L. D., 442.
- Cooper, John W. (15 L. D., 285); overruled, 25 L. D., 113.
- Cooper Bullion and Morning Star Lodge Mining Claims (35 L. D., 27); see 39 L. D., 574.
- Corlis *v. Northern Pacific R. R. Co.* (23 L. D., 265); vacated, 26 L. D., 652.
- Cornell *v. Chilton* (1 L. D., 153); overruled, 6 L. D., 483.
- Cowles *v. Huff* (24 L. D., 81); modified, 28 L. D., 515.
- Cox, Allen H. (30 L. D., 90, 463); vacated, 31 L. D., 114.
- Crowston *v. Seal* (5 L. D., 213); overruled, 18 L. D., 586.
- Culligan *v. State of Minnesota* (34 L. D., 22); modified, 34 L. D., 151.
- Cunningham, John (32 L. D., 207); modified, 32 L. D., 456.
- Dailey Clay Products Company, The (48 L. D., 429, 431); overruled so far as in conflict, 50 L. D., 656.
- Dakota Central R. R. Co. *v. Downey* (8 L. D., 115); modified, 20 L. D., 131.
- Davis, Heirs of (40 L. D., 573); overruled, 46 L. D., 110.
- De Long *v. Clarke* (41 L. D., 278); modified, 45 L. D., 54.
- Dempsey, Charles H. (42 L. D., 215); modified, 43 L. D., 300.
- Dennison & Willits (11 C. L. O., 261); overruled, 26 L. D., 122.
- Devoe, Lizzie A. (5 L. D., 4); modified, 5 L. D., 429.
- Dickey, Ella I. (22 L. D., 351); overruled, 32 L. D., 331.
- Dierks, Herbert (36 L. D., 367); overruled by the unreported case of Thomas J. Guigham, March 11, 1909.
- Douglas and Other Lodes (34 L. D., 556); modified, 43 L. D., 128.
- Downman *v. Moss* (19 L. D., 526); overruled, 25 L. D., 82.
- Dudymott *v. Kansas Pacific R. R. Co.* (5 C. L. O., 69); overruled, 1 L. D., 345.
- Dunphy, Elijah M. (8 L. D., 102); overruled, 36 L. D., 561.
- Dyche *v. Beleele* (24 L. D., 494); modified, 43 L. D., 56.
- Dysart, Francis J. (23 L. D., 282); modified, 25 L. D., 188.
- East Tintic Consolidated Mining Co. (41 L. D., 255); vacated, 43 L. D., 80.
- Easton, Francis E. (27 L. D., 600); overruled, 39 L. D., 355.
- El Paso Brick Co. (37 L. D., 155); overruled so far as in conflict, 40 L. D., 199.
- Elliott *v. Ryan* (7 L. D., 322); overruled, 8 L. D., 110. (See 9 L. D., 360.)
- Emblen *v. Weed* (16 L. D., 28); modified, 17 L. D., 220.
- Epley *v. Trick* (8 L. D., 110); overruled, 9 L. D., 360.
- Erhardt, Finsans (36 L. D., 154); overruled, 38 L. D., 406.
- Esping *v. Johnson* (37 L. D., 709); overruled, 41 L. D., 289.
- Ewing *v. Rickard* (1 L. D., 146); overruled, 6 L. D., 483.
- Falconer *v. Price* (19 L. D., 167); overruled, 24 L. D., 264.
- Fargo No. 2 Lode Claims (37 L. D., 404); modified, 43 L. D., 123.

- Febes, James H. (37 L. D., 210); overruled, 43 L. D., 183.
- Ferrell *et al.* v. Hoge *et al.* (18 L. D., 81); overruled, 25 L. D., 351.
- Fette v. Christiansen (29 L. D., 710); overruled, 34 L. D., 167.
- Fish, Mary (10 L. D., 606); modified, 13 L. D., 511.
- Fisher v. Heirs of Rule (42 L. D., 62, 64); vacated, 43 L. D., 217.
- Fitch v. Sioux City and Pacific R. R. Co. (216 L. and R., 184); overruled, 17 L. D., 43.
- Fleming v. Bowe (13 L. D., 78); overruled, 23 L. D., 175.
- Florida Mesa Ditch Co. (14 L. D., 265); overruled, 27 L. D., 421.
- Florida Railway and Navigation Co. v. Miller (3 L. D., 324); modified, 6 L. D., 716; overruled, 9 L. D., 237.
- Florida, State of (17 L. D., 355); reversed, 19 L. D., 76.
- Forgeot, Margaret (7 L. D., 280); overruled, 10 L. D., 629.
- Fort Boise Hay Reservation (6 L. D., 16); overruled, 27 L. D., 505.
- Freeman, Flossie (40 L. D., 106); overruled, 41 L. D., 63.
- Freeman v. Texas Pacific R. R. Co. (2 L. D., 550); overruled, 7 L. D., 18.
- Gallihier, Marie (8 C. L. O., 57); overruled, 1 L. D., 17.
- Gallup v. Northern Pacific Ry. Co. (unpublished); overruled so far as in conflict, 47 L. D., 304.
- Garlis v. Borin (21 L. D., 542); see 39 L. D., 162, 225.
- Garrett, Joshua (2 C. L. O., 1005); overruled, 5 L. D., 158.
- Garvey v. Tuiska (41 L. D., 510); modified, 43 L. D., 229.
- Gates v. California and Oregon R. R. Co. (5 C. L. O., 150); overruled, 1 L. D., 336.
- Gauger, Henry (10 L. D., 221); overruled, 24 L. D., 81.
- Gohrman v. Ford (8 C. L. O., 6); overruled, 4 L. D., 580.
- Golden Chief "A" Placer Claim (35 L. D., 557); modified, 37 L. D., 250.
- Goldstein v. Juneau Townsite (23 L. D., 417); vacated, 31 L. D., 88.
- Gotebo Townsite v. Jones (35 L. D., 18); modified, 37 L. D., 560.
- Gowdy v. Connell (27 L. D., 56); vacated, 28 L. D., 240.
- Gowdy v. Gilbert (19 L. D., 17); overruled, 26 L. D., 463.
- Gowdy *et al.* v. Kismet Gold Mining Co. (22 L. D., 624); modified, 24 L. D., 191.
- Grampian Lode (1 L. D., 544); overruled, 25 L. D., 495.
- Gregg *et al.* v. State of Colorado (15 L. D., 151); modified, 30 L. D., 310.
- Grinnell v. Southern Pacific R. R. Co. (22 L. D., 438); vacated, 23 L. D., 489.
- \*Ground Hog Lode v. Parole and Morning Star Lodes (8 L. D., 430); overruled, 34 L. D., 568. (See R. R. Rousseau, 47 L. D., 590.)
- Guidney, Alcide (8 C. L. O., 157); overruled, 40 L. D., 399.
- Gulf and Ship Island R. R. Co. (16 L. D., 236); modified, 19 L. D., 534.
- Gustafson, Olof (45 L. D., 456); modified, 46 L. D., 442.
- Halvorson, Halvor K. (39 L. D., 456); overruled, 41 L. D., 505.
- Handsborough, Henry C. (5 L. D., 155); overruled, 29 L. D., 59.
- Hardee, D. C. (7 L. D., 1); overruled, 29 L. D., 698.
- Hardee v. United States (8 L. D., 391; 16 L. D., 499); overruled, 29 L. D., 698.
- Hardin, James A. (10 L. D., 313); revoked, 14 L. D., 233.
- Harris, James G. (28 L. D., 90); overruled, 39 L. D., 93.
- Harrison, Luther (4 L. D., 179); overruled, 17 L. D., 216.
- Harrison, W. R. (19 L. D., 299); overruled, 33 L. D., 539.
- Hart v. Cox (42 L. D., 592); vacated, 260 U. S., 427. (See 49 L. D., 413.)
- Hastings and Dakota Ry. Co. v. Christenson *et al.* (22 L. D., 257); overruled, 28 L. D., 572.
- Hayden v. Jamison (24 L. D., 403); vacated, 26 L. D., 373.
- Heilman v. Syverson (15 L. D., 184); overruled, 23 L. D., 119.
- Heinzman *et al.* v. Letroadec's Heirs *et al.* (28 L. D., 497); overruled, 38 L. D., 253.
- Heirs of Davis (40 L. D., 573); overruled, 46 L. D., 110.
- Heirs of Philip Mulnix (33 L. D., 331); overruled, 43 L. D., 532.
- \*Heirs of Stevenson v. Cunningham (32 L. D., 650); modified, 41 L. D., 119. (See 43 L. D., 196.)
- Helmer, Inkerman (34 L. D., 341); modified, 42 L. D., 472.
- Henderson, John W. (40 L. D., 518); vacated, 43 L. D., 106. (See 44 L. D., 112, and 49 L. D., 484.)
- Hennig, Nellie J. (38 L. D., 443, 445); recalled and vacated, 39 L. D., 211.
- Herman v. Chase *et al.* (37 L. D., 590); overruled, 43 L. D., 246.
- Herrick, Wallace H. (24 L. D., 23); overruled, 25 L. D., 113.
- Hickey, M. A., *et al.* (3 L. D., 83); modified, 5 L. D., 256.
- Hildreth, Henry (45 L. D., 464); vacated, 46 L. D., 17.
- Hindman, Ada I. (42 L. D., 327); vacated in part, 43 L. D., 191.
- Hoglund, Svan (42 L. D., 405); vacated, 43 L. D., 538.
- Holden, Thomas A. (16 L. D., 493); overruled, 29 L. D., 166.
- Holland, G. W. (6 L. D., 20); overruled, 6 L. D., 639; 12 L. D., 436.
- Hollensteiner, Walter (38 L. D., 319); overruled, 47 L. D., 260.
- Holman v. Central Montana Mines Co. (34 L. D., 568); overruled so far as in conflict, 47 L. D., 590.
- Hon v. Martinas (41 L. D., 119); modified, 43 L. D., 197.
- Hooper, Henry (6 L. D., 624); modified, 9 L. D., 86, 284.

- Housman, Peter A. C. (37 L. D., 352); modified, 48 L. D., 629.
- Howard, Thomas (3 L. D., 409); see 39 L. D., 162, 225.
- Howard v. Northern Pacific R. R. Co. (23 L. D., 6); overruled, 28 L. D., 126.
- Howell, John H. (24 L. D., 35); overruled, 28 L. D., 204.
- Howell, L. C. (39 L. D., 92); see 39 L. D., 411.
- Hughes v. Greadthead (43 L. D., 497); vacated, 49 L. D., 413. (See 280 U. S., 427.)
- Hull *et al.* v. Ingle (24 L. D., 214); overruled, 30 L. D., 258.
- Huls, Clara (9 L. D., 401); modified, 21 L. D., 377.
- Hyde, F. A. (27 L. D., 472); vacated, 28 L. D., 284.
- Hyde, F. A., *et al.* (40 L. D., 284); overruled, 43 L. D., 381.
- Hyde *et al.* v. Warren *et al.* (14 L. D., 576); see 19 L. D., 64.
- Ingram, John D. (37 L. D., 475); see 43 L. D., 544.
- Inman v. Northern Pacific R. R. Co. (24 L. D., 318); overruled, 28 L. D., 95.
- Iowa Railroad Land Company (23 L. D., 79; 24 L. D., 125); vacated, 29 L. D., 79.
- Jacks v. Belard *et al.* (29 L. D., 369); vacated, 30 L. D., 345.
- Jackson Oil Co. v. Southern Pacific R. R. Co. (40 L. D., 528); overruled, 42 L. D., 317.
- Johnson v. South Dakota (17 L. D., 411); overruled, 41 L. D., 22.
- Jones, James A. (3 L. D., 176); overruled, 8 L. D., 448.
- Jones v. Kennett (6 L. D., 688); overruled, 14 L. D., 429.
- Kackmann, Peter (1 L. D., 86); overruled, 16 L. D., 464.
- Kemper v. St. Paul and Pacific R. R. Co. (2 C. L. L., 805); overruled, 18 L. D., 101.
- King v. Eastern Oregon Land Co. (23 L. D., 579); modified, 30 L. D., 19.
- Kinsinger v. Peck (11 L. D., 202); see 39 L. D., 162, 225.
- Kiser v. Keech (17 L. D., 25); overruled, 23 L. D., 119.
- Knight, Albert B., *et al.* (30 L. D., 227); overruled, 31 L. D., 64.
- Knight v. Heirs of Knight (39 L. D., 362, 491; 40 L. D., 461); overruled, 43 L. D., 242.
- Kniiskern v. Hastings and Dakota Ry. Co. (6 C. L. O., 50); overruled, 1 L. D., 362.
- Kolberg, Peter F. (37 L. D., 453); overruled, 43 L. D., 181.
- Krigbaum, James T. (12 L. D., 617); overruled, 26 L. D., 448.
- Lackawanna Placer Claim (36 L. D., 36); overruled, 37 L. D., 715.
- Lamb v. Ullery (10 L. D., 528); overruled, 32 L. D., 331.
- Largent, Edward B., *et al.* (13 L. D., 397); overruled, 42 L. D., 321.
- Larson, Syvert (40 L. D., 69); overruled, 43 L. D., 242.
- Lasselle v. Missouri, Kansas and Texas Ry. Co. (3 C. L. O., 10); overruled, 14 L. D., 278.
- Las Vegas Grant (13 L. D., 646; 15 L. D., 58); re-voked, 27 L. D., 683.
- Laughlin, Allen (31 L. D., 256); overruled, 41 L. D., 361.
- Laughlin v. Martin (18 L. D., 112); modified, 21 L. D., 40.
- Law v. State of Utah (29 L. D., 623); overruled, 47 L. D., 359.
- Lemmons, Lawson H. (19 L. D., 37); overruled, 26 L. D., 389.
- Leonard, Sarah (1 L. D., 41); overruled, 16 L. D., 464.
- Lindberg, Anna C. (3 L. D., 95); modified, 4 L. D., 299.
- Linderman v. Wait (6 L. D., 689); overruled, 13 L. D., 459.
- \*Linhart v. Santa Fe Pacific R. R. Co. (36 L. D., 41); overruled, 41 L. D., 284. (See 43 L. D., 536.)
- Little Pet-Lode (4 L. D., 17); overruled, 25 L. D., 550.
- Lock Lode (6 L. D., 105); overruled, 26 L. D., 123.
- Lockwood, Francis A. (20 L. D., 361); modified, 21 L. D., 200.
- Loneragan v. Shockley (33 L. D., 238); overruled, 34 L. D., 314; 36 L. D., 199.
- Louisiana, State of (8 L. D., 126); modified, 9 L. D., 157.
- Louisiana, State of (24 L. D., 231); vacated, 26 L. D., 5.
- Lucy B. Hussey Lode (5 L. D., 93); overruled, 25 L. D., 495.
- Luton, James W. (34 L. D., 468); overruled, 35 L. D., 102.
- Lyman, Mary O. (24 L. D., 493); overruled, 43 L. D., 221.
- Lynch, Patrick (7 L. D., 33); overruled, 13 L. D., 713.
- Madigan, Thomas (8 L. D., 183); overruled, 27 L. D., 448.
- Maginnis, Charles P. (31 L. D., 222); overruled, 35 L. D., 399.
- Maginnis, John S. (32 L. D., 14); modified, 42 L. D., 472.
- Maher, John M. (34 L. D., 342); modified, 42 L. D., 472.
- Mahoney, Timothy (41 L. D., 129); overruled, 42 L. D., 313.
- Makela, Charles (46 L. D., 509); extended, 49 L. D., 244.
- Makemson v. Snider's Heirs (22 L. D., 511); overruled, 32 L. D., 650.
- Malone Land and Water Co. (41 L. D., 138); overruled in part, 43 L. D., 110.
- Maney, John J. (35 L. D., 250); modified, 48 L. D., 153.
- Maple, Frank (37 L. D., 107); overruled, 43 L. D., 181.
- Martin v. Patrick (41 L. D., 284); overruled, 43 L. D., 536.
- Mason v. Cromwell (24 L. D., 243); vacated, 26 L. D., 369.
- Masten, E. C. (22 L. D., 337); overruled, 25 L. D., 111.
- Mather *et al.* v. Hackley's Heirs (15 L. D., 487); vacated, 19 L. D., 48.
- Maughan, George W. (1 L. D., 25); overruled, 7 L. D., 94.

- Maxwell and Sangre de Cristo Land Grants (46 L. D., 301); modified, 48 L. D., 88.
- McCalla *v.* Acker (29 L. D., 203); vacated, 30 L. D., 277.
- McCornick, William S. (41 L. D., 661, 666); vacated, 43 L. D., 429.
- \*McCraney *v.* Heirs of Hayes (33 L. D., 21); overruled, 41 L. D., 119. (See 43 L. D., 196.)
- McDonald, Roy, *et al.* (34 L. D., 21); overruled, 37 L. D., 285.
- \*McDonogh School Fund (11 L. D., 378); overruled, 30 L. D., 616. (See 35 L. D., 399.)
- McFadden *et al.* *v.* Mountain View Mining and Milling Co. (26 L. D., 530); vacated, 27 L. D., 358.
- McGee, Edward D. (17 L. D., 285); overruled, 29 L. D., 166.
- McGrann, Owen (5 L. D., 10); overruled, 24 L. D., 502.
- McGregor, Carl (37 L. D., 693); overruled, 38 L. D., 148.
- McKernan *v.* Bailey (16 L. D., 368); overruled, 17 L. D., 494.
- \*McKittrick Oil Co. *v.* Southern Pacific R. R. Co. (37 L. D., 243); overruled, 40 L. D., 528. (See 42 L. D., 317.)
- McNamara *et al.* *v.* State of California (17 L. D., 296); overruled, 22 L. D., 666.
- McPeck *v.* Sullivan *et al.* (25 L. D., 281); overruled, 36 L. D., 26.
- \*Mee *v.* Hughart *et al.* (23 L. D., 455); vacated, 28 L. D., 209. In effect reinstated, 44 L. D., 414; 487; 46 L. D., 434; 48 L. D., 195; 346; 348; 49 L. D., 260; 662.
- \*Meeboer *v.* Heirs of Schut (35 L. D., 335); overruled, 41 L. D., 119. (See 43 L. D., 196.)
- Mercer *v.* Buford Townsite (35 L. D., 119); overruled, 35 L. D., 649.
- Meyer, Peter (6 L. D., 639); modified, 12 L. D., 436.
- Meyer *v.* Brown (15 L. D., 307); see 39 L. D., 162, 225.
- Miller, Edwin J. (35 L. D., 411); overruled, 43 L. D., 181.
- Miller *v.* Sebastian (19 L. D., 288); overruled, 26 L. D., 443.
- Milner and North Side R. R. Co. (36 L. D., 488); overruled, 40 L. D., 187.
- Milton *et al.* *v.* Lamb (22 L. D., 339); overruled, 25 L. D., 550.
- Milwaukee, Lake Shore and Western Ry. Co. (12 L. D., 79); overruled, 29 L. D., 112.
- Miner *v.* Mariott *et al.* (2 L. D., 709); modified, 28 L. D., 224.
- Minnesota and Ontario Bridge Company (30 L. D., 77); no longer followed, 60 L. D., 539.
- \*Mitchell *v.* Brown (3 L. D., 65); overruled, 41 L. D., 396. (See 43 L. D., 520.)
- Monitor Lode (18 L. D., 358); overruled, 25 L. D., 495.
- Moore, Charles H. (16 L. D., 204); overruled, 27 L. D., 482.
- Morgan *v.* Craig (10 C. L. O., 234); overruled, 5 L. D., 303.
- Morgan *v.* Rowland (37 L. D., 90); overruled, 37 L. D., 618.
- Moritz *v.* Hinz (36 L. D., 450); vacated, 37 L. D., 382.
- Morrison, Charles S. (36 L. D., 126); modified, 36 L. D., 319.
- Morrow *et al.* *v.* State of Oregon *et al.* (32 L. D., 54); modified, 33 L. D., 101.
- Moses, Zelmer R. (36 L. D., 473); overruled, 44 L. D., 570.
- Mountain Chief Nos. 8 and 9 Lode Claims (36 L. D., 100); overruled in part, 36 L. D., 551.
- Mt. Whitney Military Reservation (40 L. D., 315); see 43 L. D., 33.
- Muller, Ernest (46 L. D., 243); overruled, 48 L. D., 163.
- Muller, Esberne K. (39 L. D., 72); modified, 39 L. D., 360.
- Mulnix, Philip, Heirs of (33 L. D., 331); overruled, 43 L. D., 532.
- Nebraska, State of (18 L. D., 124); overruled, 28 L. D., 358.
- Nebraska, State of, *v.* Dorrington (2 C. L. L., 647); overruled, 26 L. D., 123.
- Neilsen *v.* Central Pacific R. R. Co. *et al.* (26 L. D., 252); modified, 30 L. D., 216.
- Newbanks *v.* Thompson (22 L. D., 490); overruled, 29 L. D., 108.
- Newlon, Robert C. (41 L. D., 421); overruled, 43 L. D., 364.
- New Mexico, State of (46 L. D., 217); overruled 48 L. D., 98.
- Newton, Walter (22 L. D., 322); modified, 25 L. D., 188.
- New York Lode and Millsite (5 L. D., 513); overruled, 27 L. D., 373.
- \*Nickel, John R. (9 L. D., 388); overruled, 41 L. D., 129. (See 42 L. D., 313.)
- Northern Pacific R. R. Co. (20 L. D., 191); modified, 22 L. D., 224; overruled, 29 L. D., 550.
- Northern Pacific R. R. Co. *v.* Bowman (7 L. D., 238); modified, 18 L. D., 224.
- Northern Pacific R. R. Co. *v.* Burns (6 L. D., 21); overruled, 20 L. D., 191.
- Northern Pacific R. R. Co. *v.* Loomis (21 L. D., 395); overruled, 27 L. D., 464.
- Northern Pacific R. R. Co. *v.* Marshall *et al.* (17 L. D., 545); overruled, 28 L. D., 174.
- Northern Pacific R. R. Co. *v.* Miller (7 L. D., 100); overruled, 16 L. D., 229.
- Northern Pacific R. R. Co. *v.* Sherwood (28 L. D., 126); overruled, 29 L. D., 550.
- Northern Pacific R. R. Co. *v.* Symons (22 L. D., 686); overruled, 28 L. D., 95.
- Northern Pacific R. R. Co. *v.* Urquhart (8 L. D., 365); overruled, 28 L. D., 126.
- Northern Pacific R. R. Co. *v.* Walters *et al.* (13 L. D., 230); overruled so far as in conflict, 49 L. D., 391.
- Northern Pacific R. R. Co. *v.* Yantis (8 L. D., 58); overruled, 12 L. D., 127.
- Nyman *v.* St. Paul, Minneapolis, and Manitoba Ry. Co. (5 L. D., 396); overruled, 6 L. D., 750.
- O'Donnell, Thomas J. (28 L. D., 214); overruled, 35 L. D., 411.
- Olson *v.* Traver *et al.* (26 L. D., 350, 628); overruled, 29 L. D., 480; 30 L. D., 382.
- Opinion A. A. G. (35 L. D., 277); vacated, 36 L. D., 342.

- Oregon Central Military Wagon Road Co. *v.* Hart, (17 L. D., 480); overruled, 18 L. D., 543.
- Owens *et al.* *v.* State of California (22 L. D., 369); overruled, 38 L. D., 253.
- Pacific Slope Lode (12 L. D., 686); overruled, 25 L. D., 518.
- Papini *v.* Alderson (1 B. L. P., 91); modified, 5 L. D., 256.
- Patterson, Charles E. (3 L. D., 260); modified, 6 L. D., 284, 624.
- Paul Jones Lode (28 L. D., 120); modified, 31 L. D., 359.
- Paul *v.* Wiseman (21 L. D., 12); overruled, 27, L. D., 522.
- Pecos Irrigation and Improvement Co. (15 L. D., 470); overruled, 18 L. D., 168, 268.
- Pennock, Bell L. (42 L. D., 315); vacated, 43 L. D., 66.
- Perry *v.* Central Pacific R. R. Co. (39 L. D., 5); overruled so far as in conflict, 47 L. D., 304.
- Phebus, Clayton (48 L. D., 128); overruled so far as in conflict, 50 L. D., 281.
- Phelps, W. L. (8 C. L. O., 139); overruled, 2 L. D., 854.
- Phillips, Alonzo (2 L. D., 321); overruled, 15 L. D., 424.
- Phillips *v.* Breazeale's Heirs (19 L. D., 573); overruled, 30 L. D., 93.
- Pieper, Agnes C. (35 L. D., 459); overruled, 43 L. D., 374.
- Pietkiewicz *et al.* *v.* Richmond (29 L. D., 195); overruled, 37 L. D., 145.
- Pikes Peak Lode (10 L. D., 200); overruled so far as analogous, 20 L. D., 204.
- Pikes Peak Lode (14 L. D., 47); overruled, 20 L. D., 204.
- Popple, James (12 L. D., 433); overruled, 13 L. D., 588.
- Powell, D. C. (6 L. D., 302); modified, 15 L. D., 477.
- Premo, George (9 L. D., 70); see 39 L. D., 162, 225.
- Pringle, Wesley (13 L. D., 519); overruled, 29 L. D., 599.
- Provansal, Victor H. (30 L. D., 616); overruled, 35 L. D., 399.
- Prue, widow of Emanuel (6 L. D., 436); vacated, 33 L. D., 409.
- Pugh, F. M., *et al.* (14 L. D., 274); in effect vacated, 232 U. S., 452.
- Puyallup Allotments (20 L. D., 157); modified, 29 L. D., 628.
- Rancho Alisal (1 L. D., 173); overruled, 5 L. D., 320.
- Rankin, James D., *et al.* (7 L. D., 411); overruled, 35 L. D., 32.
- Rankin, John M. (20 L. D., 272); reversed, 21 L. D., 404.
- Rebel Lode (12 L. D., 683); overruled, 20 L. D., 204; 48 L. D., 523.
- \*Reed *v.* Buffington (7 L. D., 154); overruled, 8 L. D., 110. (See 9 L. D., 360.)
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**DECISIONS**  
RELATING TO  
**THE PUBLIC LANDS.**

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**QUERBES v. TRAMMEL.**

*Decided August 14, 1923.*

**CONTEST—HOMESTEAD ENTRY—PRACTICE—NOTICE—ADVERSE CLAIM.**

Failure to comply with the proof of publication requirement prescribed in Rules of Practice 8 and 10, is not a sufficient ground for the abatement of a contest, where the contestant is seeking to cancel an entry because he is claiming the land under color of title, and the contestee fails to answer allegations which, when undisputed, warrant the holding that the tract was not subject to entry.

**FINNEY, First Assistant Secretary:**

At the Baton Rouge, Louisiana, land office on September 27, 1919, Giles Trammel made entry under section 2289, Revised Statutes, for lot 3, Sec. 19, T. 17 N., R. 13 W., La. M. (8 acres). An application to contest said entry was filed November 15, 1922, by Andrew Querbes, who alleged that he and his predecessors in title had owned the land for more than fifty years, and that his title had been recognized by all in the vicinity and had never been questioned.

Notice of the contest was served by publication, after the sheriff of the county was unable to make personal service of notice. The notice was published once a week from January 5, 1923, to February 16, 1923. The registered notice sent to entryman at his record address was returned unclaimed. A copy of the published notice was posted on the land and in the local office during the period of publication.

Proof of service of the notice was not filed in the local office until May 14, 1923. Because thereof, the Commissioner of the General Land Office, by decision dated June 6, 1923, held that the contest had abated. The contestant has appealed.

Rule 8, Rules of Practice, provides, among other things, that if proof of publication is not made within twenty days after the fourth publication, as specified in Rule 10, the contest shall abate.

Querbes is not merely seeking a preference right of entry on a charge that Trammel had not complied with the homestead law, but is seeking to cancel the entry because he is claiming the land under color of title, and is entitled to be heard either by the Land Department or in the local courts. In such cases, it is not considered proper to dismiss the proceedings because proof of the acts necessary to confer jurisdiction was not filed within the time required by the Rules of Practice.

No answer having been made by entryman and the allegations of the contestant being sufficient, if undisputed, to warrant the holding that the tract was not subject to entry at the date Trammel entered the land, the entry will be canceled, the decision appealed from being reversed, unless entryman shows within the period allowed for filing a motion for rehearing (30 days from notice hereof) that he had no notice of the contest and has a good defense thereto.

### GLEN S. CLAPP.

*Decided August 16, 1923.*

#### SOLDIERS' HOMESTEAD—DECLARATORY STATEMENT—FILING—AGENT—MILITARY SERVICE—STATUTES.

The provision of section 2309, Revised Statutes, relating to the filing of soldiers' and sailors' homestead declaratory statements by agent was not extended by Congress to include survivors who served in the war with Germany and consequently is inapplicable to them.

FINNEY, *First Assistant Secretary*:

Glen S. Clapp, by his agent, Charles Lansing, on February 3, 1923, filed homestead declaratory statement 017920, in the Gainesville, Florida, land district, for the SE.  $\frac{1}{4}$  NW.  $\frac{1}{4}$ , NE.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , Sec. 6, T. 23 S., R. 38 E., T. M.

Said declaratory statement the Commissioner of the General Land Office by decision dated April 18, 1923, rejected for the reason that the military service of Clapp was rendered during the war with Germany and that there was no provision of law under which he could file declaratory statement by agent.

An appeal to the Department was filed.

The provisions of section 2309, Revised Statutes, were not extended by Congress to persons who served in the war with Germany. Wherefore, survivors of that war can not file declaratory statements through agents. See paragraph 12 (a), Regulations of May 26, 1922 (49 L. D., 118, 121.)

The decision appealed from is affirmed.

**ISAAC P. PALMER.***Decided August 16, 1923.***STOCK-RAISING HOMESTEAD—ENLARGED HOMESTEAD—APPLICATION.**

One who files an application under the enlarged homestead act or the stock-raising homestead act for a tract of undesignated land can not be charged with claiming the land therein described until the date the application is allowable after the designation of the land becomes effective.

**FINNEY, First Assistant Secretary:**

This is an appeal by Isaac P. Palmer from a decision of the Commissioner of the General Land Office dated March 28, 1923, holding for cancellation his preemption entry embracing lots 16 and 17, Sec. 3, and lot 4, Sec. 10, T. 37 N., R. 17 W., N. M. M. (114.98 acres), Durango, Colorado, land district.

It appears that on May 28, 1921, Palmer applied to make entry under section 1 of the stock-raising homestead act for the tracts above described and SE.  $\frac{1}{4}$ , Sec. 4, NE.  $\frac{1}{4}$  and NW.  $\frac{1}{4}$  SE  $\frac{1}{4}$ , Sec. 9, said township (474.98 acres), filing therewith a petition for the designation of the land. On October 10, 1921, he filed a preemption declaratory statement for the 114.98 acres first above described, alleging settlement thereon on June 1, 1921. Upon the filing of a withdrawal as to lots 16 and 17, Sec. 3, and lot 4, Sec. 10, of the application under the stock-raising homestead act, the declaratory statement was allowed December 8, 1921. Final proof was submitted January 24, 1922, and final certificate issued two days later.

The Commissioner held that the pendency of the application to make an entry under the stock-raising homestead act for 360 acres disqualified Palmer from making the entry in question.

Pursuant to the provisions of the act of August 30, 1890 (26 Stat., 371, 391), the forms for use in making entries under section 2289, Revised Statutes, and timber and stone, desert land, and preemption entries require the applicant to swear that since August 30, 1890, he has not acquired title to—

nor am I now claiming under any of the public-land laws of the United States, other than the mineral-land laws, an amount of land which, together with the land above described, will exceed in the aggregate 320 acres.

The preemption declaratory statement filed by Palmer contained such allegation.

The stock-raising homestead act provides (section 2) that no right to occupy the land shall be acquired by reason of the filing of an application and petition for designation until the land has been designated as subject to entry under the act.

The 360 acres embraced in Palmer's application under the stock-raising homestead act had not been designated at the date of the

filing of the preemption declaratory statement, and of course he could not foretell that the land would later be designated. Moreover, the regulations provide that after the designation of land takes effect no application therefor will be allowed under the act or under any other law until 90 days shall have elapsed if the records show that it may conflict with a preferential right to be claimed on account of an entry for adjoining land.

It follows that at the date of the filing of his preemption declaratory statement Palmer was not "claiming" the 360 acres described in his application to make entry under the stock-raising homestead act.

The rule to be followed in such cases may be stated thus: One who files an application under the enlarged homestead act or the stock-raising homestead act for a tract of undesignated land can not be charged with claiming the land therein described until the date the application becomes allowable after the designation of the land becomes effective.

For the reasons stated, the decision appealed from is reversed.

### BENNER, POWELL, TRANSFEREE.

*Decided August 17, 1923.*

#### RECLAMATION HOMESTEAD—FINAL PROOF—ALIEN—CITIZENSHIP—ASSIGNMENT.

An alien who has submitted five-year proof upon a reclamation homestead entry which is satisfactory except as to his citizenship qualifications may make a valid assignment of the entry under the act of June 23, 1910.

#### RECLAMATION HOMESTEAD—FINAL PROOF—MORTGAGE—MORTGAGEE—ASSIGNMENT.

One who purchases a reclamation homestead entry at a mortgage foreclosure sale upon which satisfactory final five-year proof had previously been submitted is entitled to have the foreclosure deed treated as an assignment of the entry under the act of June 23, 1910.

#### FINNEY, *First Assistant Secretary*:

At the Billings, Montana, land office on July 18, 1911, Henry Benner made entry under section 2289, Revised Statutes, and the act of June 17, 1902 (32 Stat., 388), for farm unit "M," or SW.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , Sec. 2, T. 2 N., R. 28 E., M. M.

On January 17, 1919, entryman filed notice of intention to submit final five-year proof, and the same was submitted March 27, 1919. The local officers suspended the proof for evidence of naturalization, and in default of such evidence the Commissioner of the General Land Office, by decision dated April 19, 1923, rejected the final proof and canceled the entry. Thereafter, Josephine Powell, who purchased the premises at a mortgage foreclosure sale on November 26, 1921, filed an appeal to the Department.

According to the final-proof testimony, entryman and his family, consisting of his wife and four children, had resided continuously on the land since July, 1911. The improvements were valued at \$600, and consisted of a frame house, 14 by 28 feet, barn, chicken house, implement shed, root cellar, and fencing. In 1912, 17 acres were cultivated; the same area was cultivated each year, except in 1918, when the area under cultivation was increased to 22 acres.

The Commissioner did not take any action on the final proof until after the premises had been purchased at the foreclosure sale by the appellant.

Under the facts disclosed, the Department is of opinion that appellant is entitled to have the foreclosure deed treated as an assignment of the entry, under the act of June 23, 1910 (36 Stat., 592). The final proof showed satisfactory compliance of the ordinary provisions of the homestead law for more than five years, and although entryman had not been admitted to citizenship, he was nevertheless qualified to make the showing required by the act of June 23, 1910, *supra*, as a basis for assigning the entry.

The record is therefore remanded, with directions that the entry be reinstated and Josephine Powell recognized as the assignee thereof provided she files, within thirty days from notice, the affidavit required of assignees, printed as part of paragraph 41 of the regulations of May 18, 1916 (45 L. D., 385, 395).

### INDEPENDENT LEAD AND COPPER COMPANY v. LEVELLE (ON REHEARING).

*Decided August 18, 1923.*

PRACTICE—APPEAL—NOTICE—LAND DEPARTMENT—JURISDICTION—HOMESTEAD ENTRY.

While Rule 95, Rules of Practice, provides that notice of appeal must be served on an adverse party either personally or by registered mail, yet failure to receive such notice does not deprive the Department of its jurisdiction to act upon the appeal.

APPEAL—ESTOPPEL—HOMESTEAD ENTRY.

One is not estopped from exercising his right of appeal to the Department because of prior statements made to an adverse party to the controversy to the effect that the decision of the Commissioner of the General Land Office, when rendered, would be accepted by him as final.

HOMESTEAD ENTRY—ADVERSE CLAIM—NOTICE—COURTS—LAND DEPARTMENT.

Service of notice upon a homestead entryman of the commencement of a suit against him in the local courts by an adverse claimant in no wise calls in question before the Land Department the validity of the entry.

see 35 L D 287  
33 L D 139

## MINING CLAIM—MINERAL LANDS—HOMESTEAD ENTRY—NOTICE—EVIDENCE.

A location certificate does not of itself constitute evidence of the mineral character of the land described therein, nor do the recitals in a location notice or certificate that a discovery has been made constitute evidence of discovery.

## DEPARTMENTAL DECISIONS CITED AND APPLIED—PRIOR DEPARTMENTAL DECISION ADHERED TO.

Cases of *Magruder v. Oregon and California Railroad Co.* (28 L. D., 174), *Todd v. Hays*, on review (34 L. D., 371), and *United States v. Bunker Hill and Sullivan Mining and Concentrating Co.* (48 L. D., 598), cited and applied; case of *Independent Lead and Copper Company v. Levelle*, on rehearing (47 L. D., 169), adhered to.

FINNEY, *First Assistant Secretary*:

The Independent Lead and Copper Company, the mineral protestant in this case, has filed a motion for rehearing asking that the departmental decision on appeal herein dated April 28, 1923, in so far as it awards 80 acres of the land in controversy to the homestead claimant, Thomas Levelle, be vacated and set aside and that the decisions of the Commissioner and the local officers in favor of the company be affirmed.

On September 5, 1911, Thomas Levelle made homestead entry 06136, which was later amended to include the E.  $\frac{1}{2}$  NW.  $\frac{1}{4}$ , as well as the E.  $\frac{1}{2}$  SW.  $\frac{1}{4}$ , Sec. 33, T. 11 N., R. 4 W., M. P. M., Helena, Montana, land district. April 30, 1915, he made additional entry 011607, for the NE.  $\frac{1}{4}$ , said section 33, under the enlarged homestead act. August 6, 1918, final proof was submitted and on the same day the company filed its mineral protest. Later, an amended protest was filed. These protests were considered by the Department in its decisions of March 13, 1919, and May 16, 1919, the last mentioned decision being reported in 47 L. D., 169. Hearing was had in January, 1921, and the local officers held that the land was mineral in character and recommended that both entries be canceled. Upon appeal that decision was affirmed by the Commissioner and further appeal by Levelle brought the case before the Department. Thereupon the concurring findings and conclusions below with respect to the E.  $\frac{1}{2}$  NW.  $\frac{1}{4}$  and NE.  $\frac{1}{4}$ , said section 33, were affirmed. As to the E.  $\frac{1}{2}$  SW.  $\frac{1}{4}$ , said section 33, the Department held the land to be non-mineral in character, permitted the original homestead entry to remain intact as to said tract and dismissed the protest. This decision is now called in question.

In connection with the present motion the evidence has been carefully reconsidered. There is found no such direct and affirmative proof as convinces the mind that valuable mineral deposits have been disclosed or exist within the tract in question or that an adequate discovery of mineral had been made upon the locations in con-

fluct therewith. The testimony is insufficient to warrant a conclusion that further labor or expenditure would be justified with prospect of developing a paying mine. The land lies within 7 or 8 miles of the city of Helena and is in a district where prospecting and mining were initiated at an early day. For more than 35 years the district has been investigated and exploited. Claims have been located upon this land and cuts and pits excavated. Later the ground has been abandoned and afterwards located. Some ore has been taken and shipped to the smelter from workings within about one fourth of a mile to the north and to the west of the tract. So far as appears no one has ever found any deposits justifying milling or shipping upon this particular ground. The mining claims now covering the land were located in 1904 and 1907, and are part of a large group of some 80 claims in that vicinity, located and controlled by the same parties who have sought to lease or sell them. No systematic development work has been undertaken. It is asserted that financial means have been lacking. Ample time has elapsed for the exploration of the ground and the development of the mineral possibilities of the land. The Department is not persuaded that its conclusion upon appeal with respect to this 80-acre tract was incorrect. Certain technical objections are urged. It is asserted that the appeal to the Department was not served upon the company or its attorneys. Evidence of mailing by registered letter addressed to the company at Helena, Montana, is attached to the notice of appeal. The appeal from the local officers to the Commissioner was served in that same manner and no objection to that service was raised. Service of the departmental decision herein was made by registered mail, directed to the company at Helena, Montana, and that letter was received and acted on. The Rules of Practice (Rule 95, 48 L. D., 246, 262) provide that notice of appeal must be served on adverse party either personally or by registered mail. The adverse party is entitled to notice and to his day before the Department upon appeal but failure to receive such notice does not necessarily preclude the Department from acting. The situation here presented is somewhat similar to that disclosed in the case of *Todd v. Hays*, on review (34 L. D., 371), where it is held, syllabus: *See 1220419*

The Rules of Practice require that notice of an appeal to the Department shall be served upon the appellee or his counsel; but where decision in a case is inadvertently rendered by the Department in the absence of proof of service of the appeal, such decision will not be disturbed on motion for review, in the absence of a showing of reversible error, merely because of want of proper service of the appeal.

It is argued that the protestant company and its officers and agents were misled and deceived by statements made by Levelle to the effect that the decision of the Commissioner would be accepted

*Upon reexamination of the record the Dept is convinced that no injustice has been done by the decision already rendered*

*for change or modification of the decision already rendered*

by him as final and that no appeal would be taken therefrom. Such statements, it is averred, were made to two sons of the president of the company in the spring of 1921. This was some months before the Commissioner's decision which was rendered on July 27, 1922. Such statements of Levelle did not preclude him from exercising his right of appeal to the Department.

It is also urged that the land was not unappropriated public domain, subject to homestead entry at the time Levelle attempted to acquire homestead rights thereon, it being included in mining locations, and having been classified as mineral land under the Northern Pacific classification act of February 26, 1895 (28 Stat., 683). These contentions are without substantial merit and have heretofore been considered and decided in this case adversely to the company. See 47 L. D., 169. The service of a notice by the company upon the homestead claimant in 1914, and the commencement of suit against him in the local court in 1917, in no way called in question the validity of the homestead entries before the Land Department. As before stated, the first protest was filed on August 6, 1918, the day on which final proof was submitted. That was the first challenge lodged by the company in the Land Department against the entries for the lands described. The statement in the decision on appeal, that the entry as to the 80-acre tract had stood unchallenged of record by the mineral claimants for approximately 7 years is correct, for the records of the Land Department are the ones contemplated.

The recitals in a location notice or certificate that a discovery has been made are not evidence of discovery. A location certificate does not of itself constitute evidence of the mineral character of the land included therein. See cases of *United States v. Bunker Hill and Sullivan Mining and Concentrating Company* (48 L. D., 598), and *Magruder v. Oregon and California Railroad Co.* (28 L. D., 174). The contentions of the company to the contrary are not well founded. Further discussion of the company's argument in support of its motion is not deemed essential. It is concluded after reexamination of the record that there was no substantial error in the decision attacked. Conceding that the company failed to receive notice of Levelle's appeal, that may now be deemed cured by reason of the present motion and argument which have induced the reexamination of the record and the consideration of the case in the light of the contentions urged on behalf of the company. The protestant has been given its day before the Department in opposition to the homesteader's appeal. No reversible error having been pointed out or otherwise appearing, the decision complained of will stand. The motion for rehearing is denied.

**STATE OF CALIFORNIA, PARKER, TRANSFEREE.***Decided August 21, 1923.***SELECTION—WITHDRAWAL—VESTED RIGHTS.**

Failure of a selector to fulfil, prior to the attachment of a withdrawal, an additional requirement imposed upon him by amended regulations, will not defeat a selection if, at the time of its acceptance by the local officers, there had been full compliance with the law and all existing applicable departmental regulations.

**FINNEY, *First Assistant Secretary:***

Under date of April 16, 1897, the Commissioner of the General Land Office returned to the Stockton, California, land office an application by the State of California to select the SE.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , Sec. 26, T. 4 S., R. 15 E., M. D. M., in lieu of 40 acres in Sec. 16, T. 8 S., R. 9 E., S. B. M., with directions that it be accepted upon proof of the nonmineral character of the selected land and payment of the required fee. The required proof being filed and the fee paid, the selection was accepted by the local officers on May 11, 1897.

The selected tract was withdrawn and included in Power Site Reserve No. 328 by Executive order of December 31, 1912.

On March 5, 1918, pursuant to a requirement by the Commissioner of the General Land Office, the State filed a certificate that the base land had not been incumbered or transferred.

By decision dated May 31, 1923, the Commissioner of the General Land Office held that the selection was not perfected until March 5, 1918, and that it would be canceled, because of the withdrawal of the land on December 31, 1912, unless the State agreed to accept approval of the selection with the reservations and limitations provided for by section 24 of the Federal water power act. An appeal has been filed by S. Webber Parker, claiming the selected land by purchase from the State.

The State had complied with the law and all applicable regulations prior to May 11, 1897, when the selection was accepted by the Stockton officers. It was not until the regulations were amended on March 11, 1899 (28 L. D., 195), that the State was required to file a certificate that the base land had not been encumbered, sold, or disposed of.

It thus appears that the selection was perfected prior to the date of the withdrawal of December 31, 1912, and that the State is entitled to the approval thereof without the reservation provided for by section 24 of the Federal water power act.

The decision appealed from is reversed.

## WHITTEN ET AL. v. READ (ON PETITION).

*Decided August 27, 1923.*

## LAND DEPARTMENT—RES JUDICATA—SUPERVISORY AUTHORITY.

In the exercise of its broad powers to do justice the Land Department should so far as within it lies put an end to controversies involving title to public lands which have been once finally adjudicated by it.

## PATENT—SURVEY—PLAT—ENTRY—ACCRETION—RIPARIAN RIGHTS—LAND DEPARTMENT—JURISDICTION.

Where the question arises whether a patent, issued on an entry in accordance with the official plat of survey existing at date of entry, conveyed title to adjoining lands added by accretion, it is competent for the Land Department to decide whether the accreted land is public land subject to disposal or privately owned land over which it has no jurisdiction.

## LAND DEPARTMENT—SUPERVISORY AUTHORITY—RES JUDICATA—PATENT—ACCRETION—RIPARIAN RIGHTS.

When the Land Department has once finally adjudged that the title to accreted land passed with the patent conveying the adjoining land, it is competent for it to take such action, within the scope of its powers, as will render its judgment effective, and, to this end, it may issue a supplemental patent in order that such determination may be given the fullest effect and be in such form as to become regularly a matter of local record.

## PATENT—TRANSFEREE—SECTION 2448, REVISED STATUTES.

Section 2448, Revised Statutes, permits of the issuance of a patent in the name of a deceased person, and where a patent is thus issued, rights under it may inure to the benefit of the remote grantees of such person.

## PRIOR DEPARTMENTAL DECISIONS ADHERED TO.

Cases of *Gleason v. Pent* (14 L. D., 375), *Gleason v. Pent*, on review (15 L. D., 286), *Lewis W. Pierce* (18 L. D., 328), and *Whitten et al v. Read* (49 L. D., 253), adhered to.

FINNEY, *First Assistant Secretary*:

In this matter counsel for Henry T. Read who on June 19, 1920, presented his forest-lieu selection 016724 (Gainsville series), for lots 1 and 2, Sec. 19, T. 53 S., R. 42 E., T. M. (plat of 1875), filed on December 9, 1922, a petition for the exercise of supervisory authority which was entertained by the Department on March 15, 1923. Due service of the petition and argument in support thereof was made upon the opposing parties and they have responded. The matter was set down for oral argument and counsel representing Read, Whitten and Charles Deering appeared and were heard. B. F. Hampton, the selecting agent of the State of Florida for school lands, did not appear at the time of oral argument.

When this case was before the Department on appeal the opinion rendered on August 30, 1922 (49 L. D., 253), affirmed the decision of the General Land Office, dated December 12, 1921, which rejected the forest-lieu selection of Read and indemnity school selec-

tion 016857, filed on behalf of the State of Florida, and also declined to reinstate or revive the swamp land selection of the State which had been rejected in 1887. The departmental decision was adhered to and a motion for rehearing was denied on October 26, 1922 (49 L. D., 260). All prominent facts are set forth in said decision on appeal and a restatement of them need not be made at this time.

The action of the Department was based substantially upon the ground that the question whether this land was disposed of by the issuance of patent to W. H. Gleason in 1878, should not at this time be reopened, that having been settled many years ago by three departmental decisions, viz., *Gleason v. Pent* (14 L. D., 375); *Gleason v. Pent*, on rehearing (15 L. D., 286); and *Lewis W. Pierce* (18 L. D., 328).

The contentions now urged on behalf of Read are in substance that the United States is not bound by certain rules that ordinarily prevail in the administration of the law between private parties such as *res adjudicata* and estoppel and that in no event is the United States concluded or bound by the adverse opinions of officials so long as the legal title to land remains in the Government. It is also insisted that certain recent decisions of the Supreme Court involving lands in Louisiana are applicable and decisive of the contentions now urged, especial attention being called to the case of *Jeems Bayou Fishing and Hunting Club, et al. v. United States* (260 U. S., 561).

In that case a part of an upland timbered area of more than 500 acres, extending in four different sections was involved and the actual shore line was from a few hundred feet to three-fourths of a mile distant from the outside boundaries of the patented tract. The court stated that the circumstances as well as the extent and character of the land necessitated the conclusion that the omission from survey was of deliberate purpose or the result of such gross and palatable error as to constitute in fact a fraud upon the Government. The facts showed that no body of water had existed at or near the place indicated upon the first plat. The court also held that the United States could not be estopped by reason of certain correspondence from the General Land Office and the Geological Survey, stating that there were no unsurveyed lands in that locality. The circumstances of that controversy and the facts disclosed before the court go far beyond those set up and alleged on behalf of Read in the present case.

The decision in that case established no new principle. The facts were such as to except it from the general rule set forth in the case of *Mitchell v. Smale* (140 U. S., 406.) Attention is directed to the later case of *United States v. Lane, et al.* (260 U. S., 662), for differentiation, where the court declined to give effect to the

later survey which disclosed smaller areas and no very substantial discrepancies. It must be remembered that every case of this character depends for its solution upon the peculiar facts and circumstances involved therein.

In the case of Harvey M. La Follette, *et al.* (26 L. D. 453), involving certain Chicago lake front lands, long in controversy, the departmental decisions in Gleason *v.* Pent and Lewis W. Pierce were cited (page 471), and followed. There it was held that a certain area of land in the original meander line of Lake Michigan, which had been surveyed, was not public land and was not subject to location with McKee scrip. On page 473 of that decision the following appears:

Thus it is seen this Department has always heretofore when the question was presented, held that the land in question does not belong to the United States. If its status was left in doubt by the decisions of the supreme court, which it is not, the fact that this Department has more than once decided that the land is not public and does not belong to the United States, would be entitled to great weight in determining the present controversy.

In the case of Gleason *v.* White (199 U. S., 54), the Supreme Court had before it the question of title to lot 5 of said section 19, appearing on the plat of 1875. It will be observed that Mr. Justice Brewer in stating the case there said:

\* \* \* Included in the action was lot 1 of section 19, as shown by the plat of 1875, but as judgement was rendered for the plaintiff in respect to that tract, it is unnecessary to further refer to it.

In the course of the opinion rendered the following language was used:

It is undoubtedly true that the official surveys of the public lands of the United States are controlling. *Stoneroad v. Stoneroad*, 158 U. S. 240; *Russell v. Maxwell Land Grant Co.*, 158 U. S. 253; *United States v. Montana Lumber and Manufacturing Co.*, 196 U. S., 573; *Whitaker v. McBride*, 197 U. S. 510. Here we have two conflicting official surveys and plats, and, by mistake of the Land Department, two patents have been issued, which, in a certain aspect of the surveys and plats, also conflict. It is one of those unfortunate mistakes which sometimes occur, and which necessarily throw confusion and doubt upon titles. Since it was discovered the Land Department has wisely refused to extend the confusion by further patents under the survey of 1875.

It can not be doubted that the prior holdings of the Department in the case of Gleason *v.* Pent and in the Pierce case had been called to the attention of the Supreme Court, for the result of those decisions was the refusal to issue further patents in said section 19 under the plat of 1875. The swamp-land patent for lot 5 had been issued some years before said departmental decisions were rendered and so far as appears, without any reference to or consideration of the effect and scope of the Gleason patent. The state swamp selection

of lots 3, 4, 6 and 7 was rejected in 1885 because the land was found to be nonswamp in character.

It is true that the Supreme Court affirmed the award to White by the Florida court, of patented lot 5, at the same time remarking that full justice was done if a patent title to lands outside of Gleason's lines as shown by the plat of 1845 was sustained. In that action the trial court had given judgment for Gleason as against White with respect to land in lot 1, Sec. 19 (plat of 1875). As between the parties to that suit and those in privity that judgment became conclusive and binding and the adjudications of the Land Department as to said lots 1 and 2 and the judgment of the Florida court as to lot 1 were in harmony. The question of the status of the title to the land had been presented and was decided. It would appear that after the decision of the Supreme Court the situation remained undisturbed and the adjudications stood essentially unquestioned up to the time that the present forest-lieu selection was presented. In connection with the pending petition, Read has filed motions to dismiss the answer of Deering and of the State claiming under the swamp-land grant and also the answer on behalf of the State filed by B. F. Hampton, its school selection agent, upon the ground that said parties have acquiesced in the prior adverse decisions and have filed no petition or other pleading. It is insisted that they have nothing pending and are not entitled to be heard. This is taking too narrow a view of the case. When Read's petition was entertained, it was for the purpose of reopening the case and going into the controversy upon the merits to whatever extent might be deemed necessary. The motions to dismiss are denied.

In support of the school indemnity selection it is still urged that the forest-lieu selection, because of alleged invalid base, was illegal and void and did not segregate the land or prevent the acceptance of the application of the State. The forest-lieu selection was the prior application and until disposed of precluded the successful filing of any junior application. The indemnity school selection was properly rejected.

The record shows that Deering claims and has improved the southern portion of lot 1, Sec. 19 (plat of 1875), under conveyances pursuant to the Gleason patent. He has also connected himself with the swamp claim of the State and has requested that such claim be revived and recognized as to lots 1 and 2, Sec. 19 (plat of 1875). After due proceedings this swamp claim was denied for the stated reason that the plat of 1845 showed that the area was then covered by the waters of Biscayne Bay and had no real existence except as the bottom of said bay. It was held that they were not swamp lands on September 28, 1850, the date of the swamp-land grant, and were not

subject to the provision of the grant. For over 34 years the State acquiesced in the action rejecting its claim, and not until 1921 was any effort made to revive said claim. The Department is convinced that the swamp claim should not be revived or reinstated. Deering did not originally purchase or claim the land pursuant to title derived under the swamp-land selection. No substantial rights or equities have arisen in Deering pursuant to that claim. Nothing shown at this time would justify its revival. See the cases of *Moran v. Horsky* (178 U. S., 205), and *Honey Lake Valley Company et al.* (46 L. D., 192).

About December 8, 1921, counsel for Deering filed in the Department a petition asking that some formal order or decision be given adjusting the Gleason entry and patent to lots 3, 4, 6 and 7 and that a supplemental patent be issued if necessary or that such other order or decision be made as might be meet and proper for the purpose of establishing petitioner's title against possible controversy or question. On December 14, 1921, the Commissioner of the General Land Office was requested to report with respect to the petition, forward papers and indicate appropriate action to be taken, if any. The report was made and at the same time the record in the present case was transmitted to the Department on January 18, 1922, without comment, because appeals had been taken from the decision rendered by the Commissioner on December 12, 1921. Counsel in oral argument suggested that this petition appeared to have been overlooked in the voluminous record. The petition was filed directly in the Department and bears no evidence of service upon opposing parties. It was commented upon and met by motion to dismiss on the part of Read and was also noticed in the argument of Whitten. The decision in this matter will substantially dispose of the suggestions contained in the petition and no separate and further consideration thereof will be necessary.

Whitten claims lot 2 and N.  $\frac{1}{2}$  of lot 1 (plat of 1875), as a remote transferee under the Gleason patent, it being stated that he purchased the tracts for \$75,000 and made cash payment of \$25,000. There is with the record an affidavit of W. H. H. Gleason, son of W. H. Gleason, who alleges that he has been familiar with the land and that from the time of patent until 1910 or 1911, his father, himself, the firm of Gleason Bros. & Co., or some other person acting for them, paid taxes upon the property. In Whitten's protest it is alleged that payment of taxes by his predecessors for many years had been made continuously and regularly. Deering purchased about 1912, and Whitten in 1919, according to the record. The assertion and maintenance of claim of title pursuant to the Gleason patent has been continuous for many years. In the Pent case it was stated that

W. H. H. Gleason, as owner of the patent was entitled to lot 2 there in question. In the Commissioner's decision in the *Pierce* case, the application to make entry of lot 1; was rejected because the land had passed beyond jurisdiction of the Land Department in the patent issued to Gleason and that decision was affirmed. Since the question was first raised before it, the Department has uniformly and consistently held that title to said lots 1 and 2 had passed and was outstanding under and by virtue of the Gleason patent.

The briefs filed and arguments submitted have received careful attention. The Department is not persuaded by any of the points and contentions urged that it should now recede from the conclusions early announced in *Gleason v. Pent* and since consistently followed. The arguments submitted on behalf of Reed in support of his petition and of his forest-lieu selection are not persuasive. The only matter of doubt is that possibly the departmental action was not gone far enough in the affirmance of the Gleason title so that in the future it may not be reasonably called in question. In order to put the matter of title beyond controversy so far as the Land Department is concerned, the Department is of opinion that a supplemental patent should be issued in aid of and as an assurance of title pursuant to the Gleason patent. This action is not deemed to be precluded by anything appearing in the decision of the Supreme Court in *Gleason v. White, supra*. There lot 5 alone was in issue. The adjudication was with reference to that tract and the facts involved with respect thereto. Said lot had been adjudged to be swamp land and patented to the State and thereafter sold to White. That tract falls in an entirely different category from lots 1 and 2. As to the last mentioned lots the swamp-land claim was denied and wholly rejected. As to lot 5 there was no adjudication, judgment or decision that it had passed under the Gleason patent. The language of the Supreme Court can with propriety be confined to the scope of that case and to the situation disclosed in the record presented. Lots 1 and 2 were not before the Supreme Court as the case came up.

The confusion and difficulties that have arisen in connection with this land have in a large measure been brought about by the action taken and the decisions rendered in the Land Department. In the exercise of its broad powers to do justice this Department should so far as within it lies put an end to controversies similar to those now before it. It can not be doubted that it is competent for the Department to decide, where the matter is presented, whether a tract of land applied for is public land subject to disposal or whether the title of the Government has been heretofore divested and is outstanding. Having made a final decision in that regard, it is also competent for the Department to take such action within the scope

of its powers as will make that decision or judgment effective. Here it has been repeatedly adjudged that the title to lots 1 and 2, said section 19 (plat of 1875), was covered and conveyed by the patent issued to William H. Gleason in 1878, pursuant to his homestead entry. To the end that such determination may be given the fullest effect and be in such form as to become regularly a matter of local record, it is directed that a supplemental patent be issued. Said instrument will run in favor of the original patentee, William H. Gleason, his heirs or assigns, so as to inure to the benefit of the remote grantees holding under said Gleason. See section 2448, Revised Statutes, relating to the issuance of patent to a deceased person. The recitals of the patent should make reference to the original patent, to the published decisions of the Department relating to the two tracts and to this decision. It should also be stated that the instrument is executed in order to make more definite and certain the description of the lands which were included in the Gleason homestead entry and were on June 24, 1878, granted and conveyed to said William H. Gleason.

The conclusions heretofore announced in the decisions on appeal and on rehearing are adhered to and reaffirmed and furthermore in accordance with the views above set forth it is directed that a supplemental patent be issued.

The petition is denied.

*See page 192 + 383*  
**ROSETTI ET AL. v. DOUGHERTY.**

*Decided August 30, 1923.*

**PATENT—STOCK-RAISING HOMESTEAD—LAND DEPARTMENT—COURTS—JURISDICTION.**

Consideration and adjudication of questions relating to the character of patented lands are solely within the jurisdiction of the courts and, after the issuance of a patent, the Land Department is without authority to try and determine any question of right pertaining thereto.

**PATENT—STOCK-RAISING HOMESTEAD—LAND DEPARTMENT—JURISDICTION.**

Actual manual delivery of a patent issued for public land, subject to disposition under the public land laws, is not essential to the passing of title to the patentee, and the Land Department can not retain jurisdiction by withholding the delivery of the patent after it has been signed, sealed, countersigned and recorded.

**PATENT—STOCK-RAISING HOMESTEAD—LAND DEPARTMENT—CONTEST—JURISDICTION.**

The Land Department is without jurisdiction to entertain a contest against an entry for which a patent has been duly executed, but not delivered to the patentee because it was prematurely and erroneously issued.

STOCK-RAISING HOMESTEAD—MINING CLAIM—MINERAL LANDS—CONTEST—PREFERENCE RIGHT.

Section 9 of the act of December 29, 1918, reserves to the United States the mineral deposits in lands entered as stock-raising homesteads, and the filing of an application to make entry of lands, subject to entry under that act, confers upon the applicant a prior right to the surface that is not subject to contest by a mineral claimant who bases his right upon discovery made after the filing of the homestead application.

ATTORNEY—NOTARY PUBLIC—OFFICERS—AFFIDAVIT—STATUTES.

4710279

Section 558 of the Code of the District of Columbia, as amended by the proviso to the act of June 29, 1906, which prohibits the administering of oaths by notary publics in connection with matters pending before any of the departments of the United States Government in which they are employed as counsel, attorney, or agent, or in any way interested, applies to all such persons, whether residing in the District of Columbia or elsewhere.

FINNEY, *First Assistant Secretary:*

On March 18, 1918, Patrick Dougherty filed application to make additional stock-raising homestead entry 018910, Helena, Montana, series, for lots 1 and 4, NE.  $\frac{1}{4}$  and SW.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , Sec. 7, T. 7 N., R. 18 W., M. P. M., which application was allowed August 5, 1919. On September 18, 1922, final proof was submitted, and on October 20, 1922, final certificate was issued on the entry.

It seems that on October 22, 1922, there were received by the General Land Office two applications to contest the entry, which were filed in the local office on September 14, 1922, one executed by Charles Rossetti and the other by Albert Conrad. In the latter application Joseph King was named as one of the applicants to contest, but he did not execute it. These applications and affidavits in support thereof were in words substantially the same and contained allegations that the entry embraced the Butte and Anaconda lode mining claim, located on October 1, 1918, by Charles Rossetti, and the Common Sense lode mining claim, located on May 8, 1920, by Albert Conrad, who, on January 3, 1921, sold and conveyed an undivided one-half interest therein to Joseph King; that on each of the claims there was made on October 1, 1918, and on May 8, 1920, respectively, a discovery of a vein, lode or ledge of rock in place, bearing gold, silver, lead, copper, and other valuable metals and deposits; that the entryman had no right, title or interest in the land covered by the lode claims and could acquire no right, title or interest by virtue of his entry for the reason that the said land was well known by him at the time he filed his application to enter to contain valuable deposits; that the entryman had not made permanent improvements on the land contained in his entry to the amount of \$1.25 per acre, tending to increase the value of the said land for stock-raising purposes.

The entry was on December 1, 1922, approved for patent, and patent No. 890557 was prepared thereon, which was, on December 13, 1922, signed, sealed, countersigned, and recorded. On December 15, 1922, the patent was transmitted to the local office by the Commissioner of the General Land Office in order that it might be delivered. However, by reason of instructions of the Commissioner, dated December 16, 1922, the patent was not delivered, but was on December 19, 1922, returned by the local office to the General Land Office where it was filed with the record of the entry with which it still remains, being a part of the record of the case now before the Department.

The affidavits of contest were sworn to before a notary public, who was the attorney for the applicants. The Commissioner by decision of January 23, 1923, dismissed the applications to contest for the reason that the proviso to the act of June 29, 1906 (34 Stat., 622), amending section 558 of the Code of the District of Columbia, which provides that no notary public shall be authorized to administer oaths in connection with matters in which he is employed as counsel, attorney, or agent in which he in any way may be interested before any of the departments of the United States Government, in the District of Columbia, or elsewhere, applies not only to local attorneys but to all attorneys who are notaries who practice before the said departments. Home Mining Company (42 L. D., 526).

In his decision the Commissioner gives another reason for his dismissal of the applications to contest, which is that the entry is not subject to contest on the ground that mineral had been discovered on the land since the filing of the application to make entry, and he points out that under section 9 of the stock-raising homestead act of December 29, 1916 (39 Stat., 862), a homestead entryman acquires only the surface right to the land, the minerals being reserved to the United States; that since the homestead entryman has a prior right to the surface of the land his entry is not subject to contest on the ground that mineral has since been discovered thereon; that the rights of the mineral claimants in this case are preserved under section 9 of the stock-raising homestead act, *supra*.

Notices of the decision of the Commissioner having been served, there was filed on February 26, 1923, on behalf of each applicant what was designated as "an amended application to contest," together with an affidavit in support thereof, which applications and affidavits set forth the same allegations as those contained in the original applications and affidavits, but were sworn to before another notary public than the one who is the attorney for the applicants to contest. These applications were rejected by the local officers, and from that action appeals were, on May 25, 1923, taken to the Com-

missioner, the contention being that the amended application in each case relates to the original application and is a part thereof and in support of the contention there were cited the decisions of the Department in the cases of the Stock Oil Company (40 L. D., 198) and of *Smith v. Edgmon* (47 L. D., 37).

On February 27, 1923, appeals were taken from the decision of the Commissioner, it being argued at some length that the Commissioner was in error in dismissing the applications on the ground that mineral had been discovered on the land since the filing of the application to make the homestead entry.

On March 28, 1923, Fred Urech filed an application to contest the entry, his application being along the same lines as those of the aforesaid several applications, but he described a lode mining claim located and discovery made thereon on April 29, 1906, long prior to the time the application to enter was filed, and he omitted the charge to the effect that the entryman had not made permanent improvements on the land to the amount of \$1.25 per acre, tending to increase the value of the land for stock-raising purposes.

It may be stated that the reasons given by the Commissioner for the dismissal of the original applications of Rossetti and of Conrad and King are sound. They were absolute nullities and afford no valid basis for contest. *Shearer v. Pfann* (47 L. D., 146). This being so, they are not amendable and the so-called amended applications are, if anything, new applications, but having been filed after patent had been issued on the entry can not be considered by the Land Department. For the same reason, because filed after patent had been issued on the entry, the application to contest of Fred Urech can not be entertained. *Kline v. Stephan* (10 L. D., 343); *Ravezza v. Binum* (10 L. D., 694); *O'Shee v. Coach* (33 L. D., 295).

It is elementary that the Department has no authority to try and determine a question of right to patented lands, any question as to the character of such lands being subject to consideration and adjudication by the courts. *Moore v. Robbins* (96 U. S., 530) and *Germania Iron Co. v. United States* (165 U. S., 379). The Commissioner appears perhaps to have proceeded primarily upon the theory that, conceding that the Land Department erred so that the patent on Dougherty's entry was prematurely and hence erroneously issued, its jurisdiction over the land involved was not lost in view of the recovery by the General Land Office of the patent before manual delivery thereof to the patentee. The error, however, is not one for the Land Department to correct.

It may be well possibly to state what has been affirmed many times, since the decision in the case of *United States v. Schurz* (102 U. S., 378), that where a patent issues in accordance with the record upon which the right to a patent is predicated for a portion

of the public domain, subject by law to such disposal, the actual manual delivery of the patent is not necessary to pass title to the patentee. Title by patent is title by record. Heirs of John Lowe (2 L. D., 386); *Schweitzer v. Ross, et al.* (8 L. D., 70); *United States v. Schurz* (102 U. S., 378); *Bicknell v. Comstock* (113 U. S., 149). This patent to Dougherty was signed, sealed, countersigned, and recorded on December 13, 1922, three months, lacking one day, after the original applications to contest were filed in the local office, said applications having reached the General Land Office October 22, 1922. In the case of *United States v. Schurz*, a contest was instituted to secure cancellation of the involved entry on February 24, 1877, and the patent was signed, sealed, countersigned, and recorded on September 26, 1877, seven months thereafter.

Whether or not the patent No. 890557 was issued through inadvertence, the Department has been deprived of jurisdiction to adjudicate the matters presented to it by the record of this case. The title in fee to the lands in question has passed out of the United States, and can only be recovered by direct proceedings in the courts to set aside the patent within the time provided by law for bringing such suit. Since the Department, as already indicated, would feel compelled to affirm the Commissioner's decision, were the case open for disposal in that way, it is not inclined to seek cancellation of the patent by suit.

The patent in question is Dougherty's muniment of title to the land described therein, and it is directed that the said patent be transmitted forthwith to the local office for delivery, the Department having neither the power to cancel it, nor the right to withhold it from delivery. *Stein v. Wogan* (21 L. D., 199).

The decision of the Commissioner was without jurisdiction and is set aside. All the applications to contest aforesaid, including that of Fred Urech, are dismissed, and the several contest cases are closed.

### STATE OF ARIZONA.

*Decided August 31, 1923.*

#### SCHOOL LAND—SELECTION—INDEMNITY—MINERAL LANDS—ADVERSE CLAIM—HEARING.

A State indemnity selection, canceled upon the default of the selector after due notice to answer the charge that the land is mineral in character, will not be reinstated for the purpose of ordering a hearing in the presence of an adverse claim, even though such claim was inadvertently allowed.

FINNEY, *First Assistant Secretary*:

At the Phoenix, Arizona, land office on July 25, 1918, the State of Arizona filed an indemnity school land selection list embracing all of Sec. 13, T 13 S., R. 26 E., G. & S. R. M., against which, on December

28, 1921, the Commissioner of the General Land Office instituted proceedings under the regulations of February 26, 1916 (44 L. D., 572), charging that the land is mineral in character, containing valuable deposits of gold, silver, copper, and lead, and was known to be such on or before the filing of the State selection. The State land commissioner receipted for a copy of the charges on March 3, 1922. Under date of August 1, 1922, the State having failed to apply for a hearing, the selection was canceled.

On March 15, 1923, the State land commissioner filed in the local office an application for the reinstatement of the selection and for a hearing.

By decision dated April 23, 1923, the Commissioner of the General Land Office refused to reinstate the selection, and an appeal on behalf of the State was filed. Thereafter, a withdrawal of a request for a hearing, involving other lands, was received by the Department from the State land commissioner, which withdrawal was inadvertently filed with the record now under consideration, resulting in an order of the Department entered July 16, 1923, dismissing the appeal, whereupon the Commissioner of the General Land Office, under date of August 2, 1923, closed the case. By order entered August 24, 1923, the order of July 16, 1923, was vacated, leaving the appeal to be considered on its merits.

It now appears that on March 16, 1923, William S. Clopton applied to make entry under section 1 of the stock-raising homestead act for all of said Sec. 13. The application was suspended to await action on the application of the State for the reinstatement of the selection and on August 7, 1923, upon receipt of the Commissioner's letter of August 2, 1923, was allowed by the local officers.

The notice which the State land commissioner receipted for on March 3, 1922, notified him that if he failed to file in the local office, within thirty days, a written or printed answer, under oath, denying the charge and applying for a hearing, the selection would be reported for cancellation. The local officers withheld their report until July 12, 1922, and the selection was not canceled until August 1, 1922.

The only legal right which the State had after service of notice of the charges against the selection was to apply for a hearing in accordance with the regulations of February 26, 1916, *supra*. It ignored the proceedings, and the selection was canceled.

The only question involved is whether the selection was canceled in accordance with existing regulations, and the foregoing shows that the regulations were complied with and that the Commissioner of the General Land Office on August 1, 1922, took the only action which would have been proper. The State land commissioner does not allege that the cancellation of the selection was erroneous, but that "the people in whose interest the selection was made by the

State complain that said cancellation is working a hardship upon them."

The proper course for the State would have been to file a new selection together with an application for a hearing. The State had no legal right demanding the reinstatement of the selection, and in the presence of an adverse claim, although inadvertently allowed, the Department would not be warranted in reinstating the selection for the purpose of ordering a hearing.

The decision appealed from is accordingly affirmed.

### ORESTES C. CRAMER.

*Decided September 4, 1923.*

#### KINKAID ACT—STOCK-RAISING HOMESTEAD—ADDITIONAL—STATUTES.

The Kinkaid law, act of April 28, 1904, has no relevance to the right to make entry under the stock-raising homestead act of one who has not made an entry under the former act or in the territory affected by that act, or who, having made such entry, has not, under the Kinkaid law, the right to make an additional entry.

#### DEPARTMENTAL DECISIONS CITED AND DISTINGUISHED.

Cases of Charles Makela (46 L. D., 509), and Earl A. Mann (49 L. D., 286), cited and distinguished.

#### FINNEY, *First Assistant Secretary*:

At the Niobrara, Nebraska, land office on August 23, 1883, Orestes C. Cramer made entry under section 2289, Revised Statutes, for NW.  $\frac{1}{4}$ , Sec. 28, T. 30 S., R. 16 W., 6th P. M., which entry he perfected by final five-year proof, patent issuing on November 21, 1890. Entryman afterwards disposed of the land. Thereafter, on June 3, 1922, at the Miles City, Montana, land office, said Cramer applied to make entry under section 1 of the stock-raising homestead act of SE.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ , E.  $\frac{1}{2}$  SE.  $\frac{1}{4}$ , Sec. 19, S.  $\frac{1}{2}$ , SE.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ , Sec. 20, T. 7 S., R. 51 E., M. M.

The local officers rejected the application, holding that Cramer had exhausted his rights under the homestead law, and, on appeal, their action was affirmed by the Commissioner of the General Land Office, by decision dated February 5, 1923. An appeal to the Department has been filed.

The perfected entry embraced a tract of land within the territory affected by the so-called Kinkaid Act of April 28, 1904 (33 Stat., 547), and if, at the date of the filing of the application in question, Cramer had owned and occupied the land in the perfected entry, he would have been qualified to make an entry under section 2 of the Kinkaid Act as amended by the act of May 29, 1908 (35 Stat., 465), for 480 acres of land contiguous to his original homestead, and would, therefore, under the rule announced in the case of Charles

Makela (46 L. D., 509), be qualified to make the entry applied for. Earl A. Mann, 49 L. D., 286. But having disposed of the land embraced in his original homestead entry, he is not qualified to make an original entry under the stock-raising homestead act.

Counsel contends that the application should be allowed because Cramer is entitled to the benefits of the first proviso to section 3 of the Kinkaid Act, which reads as follows:

That a former homestead entry shall not be a bar to the entry under the provisions of this Act of a tract which, together with the former entry shall not exceed six hundred and forty acres.

Cramer's right under said proviso is the equivalent of the right to make an *original* entry; until exercised within the Kinkaid territory it is intangible, and can not affect his right to make an original or additional entry elsewhere. It is entirely different from the right granted by section 2 as amended, which was, in effect, a declaration by Congress that a person who owned and occupied a tract of land within that territory which had theretofore been entered under the homestead law could, by reason of the character of the land, perfect an additional entry for contiguous land by continuing to reside upon and improve his original entry. It was a tangible right, incident and ancillary to the original entry, which original entry, though made in the Kinkaid territory, did not exhaust the right of entry, as did an entry under the proviso to section 3.

To sum up the whole matter: The Kinkaid law has no relevancy to the right to make entry under the stock-raising homestead law of one who has not made a Kinkaid entry or an entry in that territory, or who, having made such an entry, has not, under the Kinkaid law, the right to make an additional entry.

The decision appealed from is correct and is affirmed.

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ORMILIA E. DAY.

*Decided September 4, 1923.*

LAND DEPARTMENT—COURTS—TIMBER AND STONE ACT—MINERAL LANDS—  
EVIDENCE.

The rules of law as applied by the courts are binding upon the Land Department only in so far as they are not adverse to but assist its functions as an administrative agency of the executive branch of the Government which, as the proprietor of the public domain, is a party to all proceedings relative to the disposal of the public lands, and entitled to rely upon and adhere to their classification, once arrived at, even though between others than the parties to a new application to enter.

COURT DECISION CITED AND APPLIED.

Case of United States *v.* Midwest Oil Company (236 U. S., 459), cited and applied.

FINNEY, *First Assistant Secretary*:

On April 17, 1923, Ormilia E. Day filed application, serial 012808, under the timber and stone act of June 3, 1878 (20 Stat., 89), for SW.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , Sec. 15, T. 37 N., R. 38 E., W. M., Spokane, Washington, land district.

The application was suspended by the local officers on the day of its filing, on other grounds and because the land had been declared mineral in a contest brought by one Herman Warner against serial 07209, a timber and stone application filed by Arthur W. Weir, January 23, 1912, the contestant charging that the land was mineral in character. Upon the filing of applicant Day's affidavits removing the other grounds of suspension and asserting the nonmineral character of the land, the whole record in his application was transmitted to the Commissioner for his consideration.

Decisions by the Commissioner and by the Department, had affirmed the decision of the local officers, June 28, 1913, after a hearing, finding that the land embraced in application 07209 (which embraced said SW.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , Sec. 15) was chiefly valuable for its mineral deposit and recommending that the entry be canceled as to that part in conflict with certain mineral claims. In view of that departmental decision timber and stone application 07209 was canceled and repayment made October 20, 1919.

Upon the suspension of application 012808 coming before the Commissioner, he held, June 1, 1923, that—

Because of the above decision holding the land involved to be mineral in character, said application 012808 is hereby rejected. \* \* \*

The applicant has appealed from the Commissioner's decision.

Day shows no privity of estate with former applicant Weir, so that the former adjudication of the mineral character of the same land, being adverse only to a stranger to this application, does not according to the strict rules of law bar a new hearing upon that question. But the lands involved being the same, the Land Department is free to follow its own former adjudication, if it choose, instead of reinvestigating the character of the land through another hearing. The rules of law as administered by courts are binding upon the Land Department only in so far as they are not adverse to but assist its function as an administrative branch of the executive department of the Government which, as the proprietor of the public domain, is a party to all proceedings looking to the disposal of any part of that domain, and in its executive administration is entitled to rely upon and adhere to the classification of its lands, once arrived at, even though between others than the parties to a new application to enter.

This principle of the paramount nature of the administrative side of the Land Department's work, rather than its function of adjudi-

cating the rights of private claimants, entitles it, in so adjudicating, to respect and follow its own former adjudications as to particular lands, even though not binding in strictness upon a new claimant. Its executive liberty of action in this respect is quite analagous to the executive power, existing through implication of withdrawal of lands from entry notwithstanding Congressional legislation had previously made them free and open to occupation and purchase, which is fully discussed in *United States v. Midwest Oil Company* (236 U. S., 459).

Therefore the decision of the Commissioner was correct and it is affirmed.

# INSTRUCTIONS

RELATING TO THE

## ACQUISITION OF TITLE TO PUBLIC LANDS

IN THE TERRITORY OF ALASKA.

[Circular No. 491.]<sup>1</sup>

DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE,  
*Washington, D. C., September 8, 1923.*

### LAND DISTRICTS IN ALASKA.

The act of February 14, 1902 (32 Stat. 5, 20), provided:

On and after June 1, 1902, the number of land offices and land districts in the District of Alaska is hereby reduced to one, the location of which shall be fixed by the President.

Under authority of this statute an Executive order was made by the President April 2, 1902, directing the location of the land office for the District of Alaska at Juneau. At Juneau the offices of register and receiver have been consolidated under the act of July 19, 1919 (41 Stat. 194), with the joint duties imposed upon the register. In pursuance of Executive order of May 17, 1923, the land office at Juneau was permanently discontinued June 30, 1923, and its business and archives were transferred to Anchorage, Alaska, on July 1, 1923. The act of March 2, 1907 (34 Stat. 1232), provides:

There are hereby created two additional land districts, the boundaries of which shall be designated by the President, in the District of Alaska, to be known as the Nome land district, and the Fairbanks land district, with the land offices located, respectively, at Nome, Alaska, and Fairbanks, Alaska.

By Executive order of May 14, 1907, pursuant to the authority conferred by the act of March 2, 1907, the boundaries of the Nome and Fairbanks land districts in the district of Alaska were defined and declared as they now exist, and all parts of Alaska not included within either the Nome land district or the Fairbanks land district are in the Anchorage land district.

At Nome and Fairbanks the clerks of the district courts are ex officio registers, and the marshals of said courts ex officio receivers.

### INSTRUCTIONS RELATIVE TO DESCRIPTION OF LAND IN NOTICES OF APPLICATIONS FOR PATENT, ETC., IN ALASKA.

The notices of applications for patent for lands in Alaska are, in many cases, not sufficient to apprise adverse claimants and the public generally of the location of the land applied for, and therefore do

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<sup>1</sup> This circular is a revision of Circular No. 491 (45 L. D. 227).

not serve the purpose for which such notices are required; nor can the location of the land be ascertained from the application papers themselves and without obtaining information from other sources. This is due principally to the large area of unsurveyed land in the Territory and remoteness from centers of population of much of the country. In order to give a more definite description of the land applied for, the following special instructions with reference to the Territory of Alaska are issued, which are supplemental to but do not change or modify existing regulations:

1. The field notes of survey of all claims within the Territory of Alaska, where the survey is not tied to a corner of the public survey, shall contain a description of the location or mineral monument to which the survey is tied, by giving its latitude and longitude, and its position with reference to rivers, creeks, mountains or mountain peaks, towns, or other prominent topographical points or natural objects or monuments, giving the distances and directions as nearly accurate as possible, especially with reference to any well-known trail to a town or mining camp, or to a river or mountain appearing on the map of Alaska, which description shall appear in the field notes regardless of whether or not the survey be tied to an existing monument, or to a monument established by the surveyor when making the survey in accordance with existing regulations with reference to the establishment of such monuments. The description of such monument shall appear in a paragraph separate from the description of the courses and distances of the survey.

2. All notices of applications for patent for lands in the Territory of Alaska, where the survey on which the application is based is not tied to a corner of the public survey, shall, in addition to the description required to be given by existing regulations, describe the monument to which the claim is tied by giving its latitude and longitude and a reference by approximate course and distance to a town, mining camp, river, creek, mountain, mountain peak, or other natural object appearing on the map of Alaska, and any other facts shown by the field notes of survey which shall aid in determining the exact location of such claim without an examination of the record or a reference to other sources. The registers and receivers will exercise discretion in the matter of such descriptions in the published notices, bearing in mind the object to be attained, of so describing the land embraced in the claim as to enable its location to be ascertained from the notice of application.

### **SURVEYS UNDER THE RECTANGULAR SYSTEM.**

Since Congress authorized the extension of the rectangular system of public-land surveys to the Territory of Alaska over 1,550,000 acres have been brought under survey. These surveys have been placed under the control of three independent meridians established as follows: The Seward meridian, initiated just north of Resurrection Bay and extending to the Matanuska coal fields; the Fairbanks meridian, commencing near the town of that name and controlling the surveys in that vicinity, including the Nenana coal fields; and the Copper River meridian, which lies in the valley of the Copper River and from which surveys have been executed as far north as

the Tanana River and south to the Bering River coal fields and the Gulf of Alaska.

All of these surveys have been confined to known agricultural areas, the coal fields, and such adjoining lands as might under normal conditions be attractive to settlers. The extension of the surveys to other areas will be governed largely by the requirement of the act making annual appropriations for surveying the public lands "that preference be given first in favor of surveying townships occupied in whole or in part by actual settlers" and by whether the lands are in the regular progress of such surveys.

Bona fide settlers upon the public land with the intention of acquiring title to their claims are at liberty to apply to the surveyor general at Juneau for the survey of the township or townships in which such claims are situated. Authorization of survey so applied for must, however, be dependent upon the facts and circumstances attending each case.

### HOMESTEAD CLAIMS.

Section 1 of the act of May 14, 1898 (30 Stat. 409), extending the homestead laws of the United States to Alaska, was amended by the act of March 3, 1903 (32 Stat. 1028); the general homestead laws are, therefore, in force in the Territory, except in so far as modified by said acts and by the acts of July 8, 1916 (39 Stat. 352), June 28, 1918 (40 Stat. 632), and June 5, 1920 (41 Stat. 1059).

Section 1 of the act approved May 14, 1898, is as follows:

#### ACT OF MAY 14, 1898.

SECTION 1. That the homestead land laws of the United States and the rights incident thereto, including the right to enter surveyed or unsurveyed lands under provisions of law relating to the acquisition of title through soldiers' additional homestead rights are hereby extended to the district of Alaska, subject to such regulations as may be made by the Secretary of the Interior; and no indemnity, deficiency, or lieu lands pertaining to any land grant whatsoever originating outside of said district of Alaska shall be located within or taken from lands in said district: *Provided*, That no entry shall be allowed extending more than eighty rods along the shore of any navigable water, and along such shore a space at least eighty rods shall be reserved from entry between all such claims, and that nothing herein contained shall be so construed as to authorize entries to be made, or title to be acquired, to the shore of any navigable waters within said district: *And it is further provided*, That no homestead shall exceed eighty acres in extent.

#### AMENDATORY ACT OF 1903.

An act to amend section 1 of the act of Congress approved May 14, 1898, entitled "An act extending the homestead laws and providing for a right of way for railroads in the District of Alaska," is as follows:

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That all the provisions of the homestead laws of the United States not in conflict with the provisions of this act, and all rights incident thereto, are hereby extended to the district of Alaska, subject to such regulations as may be made by the Secretary of the Interior; and no indemnity, deficiency, or lieu-land selections pertaining to any land grant outside of the district of Alaska shall be made, and no land scrip or land warrant of any kind whatsoever shall be located within or exercised

upon any lands in said district except as now provided by law: *And provided further*, That no more than one hundred and sixty acres shall be entered in any single body by such scrip, lieu selection, or soldier's additional homestead right: *And provided further*, That no location of scrip, selection, or right along any navigable or other waters shall be made within the distance of eighty rods of any lands, along such waters, theretofore located by means of any such scrip or otherwise: *And provided further*, That no commutation privileges shall be allowed in excess of one hundred and sixty acres included in any homestead entry under the provisions hereof: *Provided*, That no entry shall be allowed extending more than one hundred and sixty rods along the shore of any navigable water, and along such shore a space of at least eighty rods shall be reserved from entry between all such claims; and that nothing herein contained shall be so construed as to authorize entries to be made or title to be acquired to the shore of any navigable waters within said district; and no patent shall issue hereunder until all the requirements of sections twenty-two hundred and ninety-one, twenty-two hundred and ninety-two, and twenty-three hundred and five of the Revised Statutes of the United States have been fully complied with as to residence, improvements, cultivation, and proof, except as to commuted lands as herein provided: *And it is further provided*, That every person who is qualified under existing laws to make homestead entry of the public lands of the United States who has settled upon or who shall hereafter settle upon any of the public lands of the United States situated in the district of Alaska, whether surveyed or unsurveyed, with the intention of claiming the same under the homestead laws, shall, subject to the provisions and limitations hereof, be entitled to enter three hundred and twenty acres or a less quantity of unappropriated public land in said district of Alaska. If any of the land so settled upon, or to be settled upon, is unsurveyed, then the land settled upon, or to be settled upon, must be located in a rectangular form, not more than one mile in length, and located by north and south lines run according to the true meridian; that the location so made shall be marked upon the ground by permanent monuments at each of the four corners of the said location, so that the boundaries of the same may be readily and easily traced; that the record of said location shall, within ninety days from the date of settlement, be filed for record in the recording district in which the land is situated. Said record shall contain the name of the settler, the date of the settlement, and such a description of the land settled upon, by reference to some natural object or permanent monument, as will identify the same; and if, after the expiration of the said period of five years, or at such date as the settler may desire to commute, the public surveys of the United States have not been extended over the land located, a patent shall nevertheless issue for the land included within the boundaries of said location as thus recorded, upon proof to be submitted to the register and receiver of the proper land office, upon proof that he is a citizen of the United States, and upon the further proof required by section twenty-two hundred and ninety-one of the Revised Statutes of the United States as heretofore and herein amended, and under the procedure in the obtaining of patents to the unsurveyed lands of the United States, as provided for by section ten of the act hereby amended, and under such rules and regulations as shall be prescribed by the Secretary of the Interior as hereinbefore provided, without the payment of any purchase price or other charges, except the ordinary office fees and commissions of the register and receiver, except one dollar and twenty-five cents per acre on land commuted: *And provided always*, That no title shall be obtained hereunder to any of the mineral or coal lands of the district of Alaska: *And it is further provided*, That the right of any homestead settler to transfer any portion of the land so settled upon, as provided by section twenty-two hundred and eighty-eight of the Revised Statutes of the United States, shall be restricted and limited within the district of Alaska as follows: For church, cemetery, or school purposes to five acres, and for the right of railroads across such homestead to one hundred feet in width on either side of the center line of said railroad; and all contracts by the settler made before his receipt of patent from the Government, for the conveyance of the land homesteaded by him or her, except as herein provided, shall be held null and void.

Approved, March 3, 1903. (32 Stat. 1023.)

## ACT OF JULY 8, 1916.

An act to amend the United States homestead law in its application to Alaska, and for other purposes, is as follows:

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That every person who is qualified under existing laws to make homestead entry of the public lands of the United States who has settled upon or who shall hereafter settle upon any of the public lands of the United States situated in the District of Alaska, whether surveyed or unsurveyed, with the intention of claiming the same under the homestead laws, shall, subject to the provisions and limitations of the act approved March third, nineteen hundred and three, chapter one thousand and two, United States Statutes at Large, page one thousand and twenty-eight, be entitled to enter one hundred and sixty acres or a less quantity of unappropriated public land in said District of Alaska, and no more, and a former homestead entry in any other State or Territory shall not be a bar to a homestead entry in Alaska: *Provided*, That nothing herein contained shall be construed to limit or curtail the area of any homestead claim heretofore lawfully initiated.

SEC. 2. That there shall be excepted from homestead settlement and entry under this act the lands in Annette and Pribilof Islands, the islands leased or occupied for the propagation of foxes, and such other lands as have been or may be reserved or withdrawn from settlement or entry.

Approved, July 8, 1916. (39 Stat., 352.)

The act of June 5, 1920 (41 Stat. 1059), provides:

That the provisions of the act of May 14, 1898 (Thirtieth Statutes at Large, page 409), extending the homestead laws to Alaska, and of the act of March 3, 1903 (Thirty-second Statutes at Large, page 1028), amendatory thereof, in so far as they reserve from sale and entry a space of at least eighty rods in width between tracts sold or entered under the provisions thereof along the shore of any navigable water, and provide that no entry shall be allowed extending more than one hundred and sixty rods along the shore of any navigable water, shall not apply to lands classified and listed by the Secretary of Agriculture for entry under the act of June 11, 1906 (Thirty-fourth Statutes, page 233), and that the Secretary of the Interior may upon application to enter or otherwise in his discretion restore to entry and disposition such reserved spaces and may waive the restriction that no entry shall be allowed extending more than one hundred and sixty rods along the shore of any navigable water as to such lands as he shall determine are not necessary for harborage uses and purposes.

## UNSURVEYED LANDS.

The act of June 28, 1918 (40 Stat. 632), amended the Alaska homestead act of July 8, 1916 (39 Stat. 352), so as to provide for the survey of homesteads without expense to claimants. The section reads as follows:

SEC. 2. That if the system of public surveys has not been extended over the land included in a homestead entry, the entryman may, after due compliance with the terms of the homestead law in the matter of residence, cultivation, and improvement, submit to the register and receiver a showing as to such compliance, duly corroborated by two witnesses, and if such evidence satisfactorily shows that the homesteader is in a position to submit acceptable final proof the surveyor general of the Territory will be so advised and will, not later than the next succeeding surveying season, issue proper instructions for the survey of the land so entered without expense to the entryman, who may thereafter submit final proof as in similar entries of surveyed lands.

So far as practicable, such survey shall follow the general system of public-land surveys, and the entryman shall conform his boundaries thereto: *Provided*, That nothing herein shall prevent the homesteader from securing earlier action on his entry by a special survey at his own expense, if he so elects.

**REGULATIONS UNDER HOMESTEAD LAW.<sup>1</sup>**

The following regulations will govern the procedure under the homestead law as applicable to Alaska:

1. Except as to claims initiated before the passage of the three-year act of June 6, 1912 (37 Stat. 123), homestead entries in the Territory must be perfected under the terms of said act. For full instructions thereunder and information as to other general homestead laws, reference is made to the general homestead circular.

2. Where a claim was initiated before June 6, 1912, by application duly filed, or by settlement on a tract not covered by the public system of surveys, the homesteader may, at his option, perfect title under the three-year act or under the provisions of the old five-year law; the latter requires proof of residence and cultivation during the period indicated, but specifies no proportion of the area which must be cultivated.

**INITIATION OF CLAIMS—UNSURVEYED LANDS.**

3. Where a settler desires to acquire as a homestead land, any or all of which is unsurveyed, he may initiate his claim by settlement thereon; in order to preserve his rights he must post on the land a notice of his location and within 90 days after the settlement file a copy thereof for record with the commissioner of the recording district in which the land is situated. The tract selected must be in rectangular form, not more than 1 mile in length, located by lines running north and south, according to the true meridian, the four corners being marked by permanent monuments. The location notice should contain the name of the settler, the date of the settlement, and such description of the land claimed, by reference to some natural object or permanent monument, as will serve to identify it.

**INITIATION OF CLAIMS—SURVEYED LANDS.**

4. Where the public system of surveys has been extended over a tract, settlement rights may be established and maintained only in the same manner as is allowed in the United States, as explained in the general homestead circular; as to such claims, no posting or recording of a location notice is required, but an application for entry must be filed at the local United States land office within three months after the date of settlement, in order to preserve the preference right of entry as against subsequent settlers.

5. The application for entry must be made according to the legal subdivisions as shown by the plat of survey; excepting that it must thus conform, there is no restriction as to the shape of the tract which may be entered. Where a settlement was made and a location notice posted and filed for record before the extension of the surveys, the application should make reference thereto; it should be stated also to what extent the land applied for is different from that covered by the notice; and the settler may not abandon all of the subdivisions covered by the location, unless a showing is made which would justify amendment of his claim.

<sup>1</sup> See p. 126, relating to agricultural entries on mineral lands.

## QUALIFICATIONS OF HOMESTEADERS.

6. (a) Any settler who is qualified, so far as personal status is concerned, to make a homestead entry, may enter not exceeding 160 acres in Alaska, unless he has already made a homestead entry or filed a location notice in that Territory, or unless he is disqualified by reason of the 320-acre limitation on the area of the agricultural public land to be acquired by one person, herein below explained. Said area of 160 acres may be entered whether the land be surveyed or unsurveyed. A person who has made homestead entry for less than 160 acres in Alaska, and submitted final proof thereon, may make an additional entry for sufficient land to make up that area, being required to show residence, cultivation, and improvements in connection therewith as though it were an original entry, if the additional entry is made under section 6 of the act of March 2, 1889 (25 Stat. 854); but under section 2 of the act of April 28, 1904 (33 Stat. 527), if the additional entry is for land contiguous to that in the original entry and the applicant owns and occupies the land in the original entry the additional entry may be perfected without proof of residence upon and cultivation of the additional entry; and if final proof of settlement and cultivation has been made for the original entry when the additional entry is made then the patent may issue without further proof. Section 3 of this act prohibits commutation of entries made thereunder.

(b) Prior to July 8, 1916, a settler on the public lands in Alaska was entitled to enter 320 acres. The provisions of the act of that date did not have the effect of limiting or curtailing the area of any homestead claim lawfully initiated before its passage. Therefore, an entry for as much as 320 acres may be made in any case where a valid settlement on the land was made before July 8, 1916, provided notice thereof has been filed for record in the recording district in which the land involved is situated within 90 days after the settlement, and said settlement has been duly maintained until the filing of the application for entry. However, a person who has exhausted his right in the United States in whole, or in part, is not entitled to homestead more than 160 acres, notwithstanding that he may have made settlement antedating the act of July 8, 1916.

7. (a) Under the act last mentioned, a former homestead entry outside of Alaska does not bar the claimant's right to make homestead entry in that Territory for not exceeding 160 acres; in connection with an application for entry of that area, it is not material whether the homestead entry in the United States proper was perfected or not, and no statement on the subject of such an entry is required. However, if the applicant has made a homestead entry, or filed a location notice, in Alaska, and failed to perfect title to the land involved, he must, in connection with an application for homestead entry of another claim in Alaska, make the same showing required under the general homestead law.

(b) The act of August 30, 1890 (26 Stat. 391), limits to 320 acres the area one person may acquire after that date under the agricultural public land laws. In applying its provisions to a homestead claim for not more than 160 acres in Alaska, a homestead entry in the United States is not to be counted. As to a claim based on settlement before July 8, 1916, it may make up, with the appli-

cant's former entry, a maximum aggregate area of 480 acres; in such cases a former homestead in the United States is counted even though the claimant paid the price of the land before June 5, 1900 (being entitled to restoration of his right); and no entry for more than 160 acres based on settlement before July 8, 1916, can be allowed where the applicant has already had 320 acres, including an entry under the homestead law.

#### RESERVATIONS AND LIMITATIONS.

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8. No homestead entry outside of a national forest may extend more than 160 rods (one-half mile) along the shore of a navigable water, and along such shores a space of at least 80 rods must be reserved between claims, unless such 160-rod restriction is waived or such 80-rod reserved space shall be restored to entry by the Secretary of the Interior under authority of the act of June 5, 1920 (41 Stat. 1059). By said act of June 5, 1920, it is provided that such 160-rod restriction and such 80-rod reservation of shore space shall not apply to lands in national forests classified and listed by the Secretary of Agriculture for entry under the act of June 11, 1906 (34 Stat. 233). (See p. 81 as to reserved spaces.) The use of such reserved space of 80 rods between claims abutting on any navigable stream, inlet, gulf, bay, or seashore may be granted by the Secretary of the Interior to citizens, associations of citizens, or corporations for landings and wharves, the public being allowed access thereto.

9. A homestead entryman must show residence upon his claim for at least three years; however, he is entitled to absent himself during each year for not more than two periods making up an aggregate of five months, giving written notice to the local land office of the time of leaving the homestead and returning thereto. There must be shown also cultivation of one-sixteenth of the area of the claim during the second year of the entry and of one-eighth during the third year and until the submission of proof, unless the requirements in this respect be reduced upon application duly filed. The law provides also that the entryman must have a habitable house upon the land at the time proof is submitted.

10. To the extent of not more than 160 acres an entry may be "commuted"; that is, the claimant may show 14 months' residence upon the land and cultivation of one-sixteenth of the area commuted and pay the price of the land (\$1.25 per acre), cash certificate thereupon issuing, followed by patent in the usual manner. In such cases the homesteader is entitled to a five months' absence in each year, but can not have credit for such period, actual presence on the land for 14 months being required. Where a part of a claim only is commuted, the entry may be allowed to remain intact, or the settlement right under a recorded location notice maintained, pending future submission of three-year proof as to the remainder of the land.

11. Residence must be established upon the claim within six months after the date of the entry or the recording of the location notice, as the case may be; but an extension of not more than six months may be allowed, upon application duly filed, in which the entryman shows by his own affidavit, and that of two witnesses, that

residence could not be established within the first six months, for climatic reasons, or on account of sickness, or other unavoidable cause. A leave of absence for one year or less may be granted by the local officers to a homesteader who has established actual residence on the land, where failure or destruction of crops, sickness, or other unavoidable casualty has prevented him from supporting himself and these dependent upon him by cultivation of the land.

#### SUBMISSION OF PROOF—UNSURVEYED LANDS.

12. Where the public system of surveys has not been extended over a duly located homestead and the settler has had such compliance with the terms of the homestead law in the matter of residence, cultivation, and improvements as to justify submission of three-year proof on his claim, he may file with the register and receiver his affidavit, corroborated by two witnesses, showing such compliance. If they find this satisfactory, they will so advise the surveyor general of the Territory and he will, not later than the next succeeding surveying season, issue instructions for the survey of the land involved, without expense to the entryman. So far as practicable such surveys must follow the general system of public-land surveys and the entryman must in all cases conform his boundaries thereto. After the survey has been duly made and the plat thereof filed, proof may be submitted on the entry as in case of ordinary entries for surveyed lands. (See par. 13 and 17 below.)

However, if the settler desires to obtain earlier action in the matter of the survey, or does not wish to proceed under the act of June 28, 1918 (40 Stat. 632), he may have a survey of the tract made at his own expense by a deputy surveyor, appointed by the United States surveyor general. After the survey has been completed and been approved by the surveyor general, certified copies of the field notes and plat must be filed at the local United States land office. The proof testimony of claimant and of his two proof witnesses should also be filed then or as soon as possible thereafter.

13. The local officers, upon receipt of final proof, will carefully examine it, and, if they find same satisfactory in every respect accompanied with sufficient money to pay the amount due, will thereupon issue and transmit to the entryman notice for publication, reading as follows:

Final proof testimony on homestead entry ——— embracing ——— has been submitted by ———, entryman, and his witnesses, ———, residing at ———, and ———, residing at ———, and is now in the files of the local land office at ———, Alaska, and if no protest is filed in the local land office at ——— on or before ——— said final proof will be accepted and final certificate issued.

The claimant must arrange for publication of the notice for a period of 60 days in a newspaper designated by the register, which must be one of general circulation nearest the land in which publication is to be made. If the newspaper be published daily there must be 60 insertions of the notice; if daily except Sunday, 52 insertions; if weekly, 9 insertions; and if semiweekly, 18 insertions. Moreover, the entryman must during said 60 days keep a copy of the plat and of his notice of having made proof on the claim posted in a conspicuous place on the land.

14. If the application for entry be filed, the proof be received by the register and receiver and found satisfactory, no protest or adverse claim be filed, and the proper fee and commissions be paid, they will at once place the entry of record; after evidence of publication is filed in support of the proof the local officers will issue final certificate thereon, provided the price of the land be paid in case of commutation, or the final commissions be paid in other cases—the usual testimony fees being also paid.

15. If the proof does not show satisfactory compliance with the provisions of the homestead laws as to residence, cultivation, and improvements, but no adverse claim be filed, the register and receiver will place the homestead entry of record, on payment of the proper fee and commissions; they will, however, withhold final certificate and reject the proof, or call for supplemental evidence (allowing the usual right of appeal), or forward the papers for consideration by this office, as the circumstances of each case appear to require. They will thus forward the papers if there be filed a protest against the acceptance of the proof by the chief of field division, or a sworn protest consisting of the affidavit of a private person, corroborated by that of at least one witness.

16. If during the period of posting and publication of notice, or within 30 days thereafter, any person, corporation, or association asserting an adverse interest in, or claim to, the tract involved or any part thereof files in the land office where the application for patent is pending an adverse claim under oath, setting forth the nature and extent thereof, action on the proof will be suspended and the adverse claimant allowed 60 days after such filing within which to begin action in a court of competent jurisdiction in Alaska to quiet title to such part of the land as is covered by said claim. In such cases no final certificate will be issued, nor the entry for the land placed of record, until a final adjudication of the rights of the parties has been made by the court, or until it shall have been shown that an action was not begun within the period indicated. If an adjudication by the court be had, entry will be made and patent issued in conformity with its final decree.

#### SUBMISSION OF PROOF—SURVEYED LANDS.

17. Where the public system of surveys has been extended over a tract and homestead entry made in accordance therewith, though the claim may have been initiated by a location and the homesteader believes he has complied with all the requirements of the homestead law sufficiently to have earned title to his claim, he may appear with two witnesses having personal knowledge of the facts before either the register or receiver of the local district land office or before any officer authorized to administer oaths and using a seal and submit final proof testimony without previous notice of intention by publication. Where proper compliance with the law is shown, no adverse claim appears on the records, and no protest against the proof is filed, it will be accepted and final certificate issued pursuant thereto after proper evidence of publication is filed in support thereof. See paragraph 13 for form of notice for publication.

## TRANSFERS BEFORE PROOF.

18. In Alaska, as in the United States, a forfeiture of the claim results from a transfer of any part of the land or of any interest therein before the submission of the proof, with certain exceptions specified by law. These are somewhat different in the Territory, there being permitted transfers for church, cemetery, or school purposes to the extent of 5 acres, and for railroad rights of way across the land having an extreme width of 200 feet.

## SOLDIERS' ADDITIONAL HOMESTEAD ENTRIES.

*As to Survey - See 51340514*

Section 1 of the act of May 14, 1898 (30 Stat. 409), and the amendatory act of March 3, 1903 (32 Stat. 1028), extended to Alaska not only the laws as to homestead entries but also those provisions of law relating to the acquisition of title through soldiers' additional homestead rights, they being made applicable to unsurveyed as well as to surveyed lands. -

1. It is provided in the act of 1903 that no more than 160 acres shall be entered in any single body by scrip, lieu selection, or soldiers' additional homestead right, and the general restrictions as to the extent of claims along navigable waters and reserved spaces between the same apply to rights of this kind.<sup>2</sup>

2. A person seeking to locate soldiers' additional homestead rights must file with the register and receiver of the proper local office an application in duplicate to enter the tract, describing it by approximate latitude and longitude, and otherwise identifying it with as much certainty as may be possible without actual survey. He must also furnish evidence of the prima facie validity of the additional right and of his ownership thereof. The nonmineral and nonsaline affidavit, the affidavit of the locator's citizenship and of his unimpaired ownership of the right, and the affidavit that the land is not occupied or improved by anyone claiming it adversely to the applicant are part of the printed form (4-008-a) of application.

3. The area of the land applied for may not exceed the area of the additional right or rights tendered. If the right used is a certificate, or recertified certificate, which exceeds the area of the land entered, evidence of the unused portion may be obtained by procuring a certified copy or photostat of the certificate bearing proper notation as to the amount used.

4. The register and receiver will, upon receipt of the application and evidence, note its filing, designate the original by the current serial number, and transmit it, together with the proof of ownership of the right, to the General Land Office, forwarding the copy to the chief of field division, and furnishing the applicant with a certificate to the surveyor general that a satisfactory application has been filed and that no objection to the survey is known to them. The surveyor general will, if no objection is shown by his records, immediately deliver to the applicant an order for such survey, which will

<sup>2</sup> The last proviso to act of Mar. 8, 1922 (42 Stat. 415), prohibits making of soldiers' additional entries under sec. 2306, Revised Statutes, for withdrawn or classified coal, oil, or gas lands or lands valuable for coal, oil, or gas.

be sufficient authority for any United States deputy surveyor to make a survey of the claim.

5. The survey must be made at the expense of the applicant, and no right will be recognized as initiated by such application unless actual work on the survey is begun within 90 days after the receipt by the applicant of the order issued by the surveyor general as above directed. The rights thus secured will lapse unless the survey is continued to completion without unnecessary delay. The deputy surveyor will certify to the field notes and plat, which must be filed with the surveyor general, together with all proof required by the laws and regulations. The surveyor general will examine the plat, field notes, and proofs to ascertain whether the regulations have been complied with, and if he finds the work regular he will forward the papers to the General Land Office for acceptance.

6. If the Commissioner of the General Land Office finds the survey to be worthy of approval the surveyor general will be advised thereof and directed to file the certified copy of the plat and field notes with the register and receiver. They will thereupon notify the applicant that within 60 days from a date fixed by them he must furnish evidence of posting and publication; that on default in this respect the application will be rejected and the survey canceled. The same posting and publication of notice and evidence thereof are required as in case of entries for trade and manufacture; the same rules apply also with reference to the filing and assertion of adverse claims. (See p. 41.)

7. The register and receiver will at once mail a copy of the notice to the chief of field division also, and the application will be subject to contest for any cause affecting its validity, or on account of applicant's failure to comply with the regulations.

8. If an application is filed by an association, it must so appear, and the citizenship and age of each member thereof be shown. If it is made by a corporation, its creation must be established by the certificate of the officer having custody of the records of incorporation at the place of its formation, and it must be further shown that such corporation is authorized by law to hold land in Alaska. A certified copy of the articles of incorporation should be filed.

9. The applicant is required to file a corroborated affidavit, showing that the land contains no workable deposits of coal or petroleum, and that the land is not within an area surrounding a spring and withdrawn by the order of March 28, 1911.

10. The applicant must file corroborated affidavits fully describing all waters situated upon or crossing the land, whether creek, pond, lagoon, or lake, stating their source, depth, width, outlet, and current (whether swift or sluggish), whether or not the same or any of them are navigable for skiffs, canoes, motor boats, launches, or other small water craft, and whether or not the same or any of them constitute a passageway for salmon or other merchantable sea-going fish to spawning grounds. (See p. 81 as to reserved spaces.) He must also file corroborated affidavits, based upon personal knowledge, to the effect that the land is not within any withdrawal or reservation by the Government of the United States; that it is free from any claim by natives of Alaska; that it is not within a distance of 80 rods, along any navigable or other waters, from any land there-

tofore located by means of any such soldier's additional right, or otherwise under the act of May 14, 1898, as modified by the act of March 3, 1903, or that it has been restored from the 80-rod shore space reservation, and that it does not adjoin any other like inland or waterfront location, the area of which added to the tract would constitute a single body of land exceeding 160 acres, or that the 160-rod inhibition has been waived.

11. After all the evidence above indicated, including evidence of posting and publication, shall have been filed, the register will hold the papers during the period allowed for the filing of an adverse claim, and will thereafter transmit them to the General Land Office. The local officers will not allow the entry and issue final certificate in the absence of instructions so to do; and this rule will apply whether the right be certified or uncertified, the practice of issuing final certificates on certified rights before transmitted having been abolished.

#### **SURVEYED LANDS.**

It is to be understood that the above statements and instructions apply only to applications for unsurveyed lands. Where it is sought to locate a soldier's additional homestead right on a tract which is included in the public system of surveys, the procedure is not different in any respect from that prescribed in such cases as to surveyed lands in the United States.

#### **NATIONAL FOREST HOMESTEADS.**

The act of June 11, 1906 (34 Stat. 233), providing for homestead entries of agricultural lands within national forests, applies to such lands in Alaska. Entries made under said act are limited in area to 160 acres and are subject to the general homestead laws applicable to the United States, except that no commutation is allowed.

These entries may be made only after the lands desired have been listed by the Secretary of Agriculture as agricultural in character and after a declaration by the Secretary of the Interior that the listed lands are subject to settlement and entry.

Information as to the boundaries of the forests, the method of applying for listing, etc., may be obtained by addressing the Forester, Washington, D. C., or the United States District Forester at Juneau, Alaska.

Instructions under act of June 5, 1920 (41 Stat. 1059), restoring shore space lands within national forests in Alaska (see p. 81):

2. This act abolishes all the above-mentioned restrictions so far as concerns lands within national forests. An application for homestead entry for lands which have been listed as agricultural in character under the act of June 11, 1906, will be allowed, if otherwise regular, without any regard whatsoever to the relation of the tract involved to a body of navigable water, unless wharf or landing privileges thereon shall have been granted or application therefor be pending.

## LANDS OUTSIDE OF FORESTS.

3. As to lands outside of national forests the limitations mentioned still exist, the laws establishing them being in full force and effect; moreover tracts covered by wharf or landing privileges, or by applications therefor, are not subject to appropriation. No rights under the public land laws can be secured, in conflict with the restrictions above set forth, either by settlement or filing of location notice or by application for entry, unless and until the shore space involved shall have been restored, or the waiver as to excessive length shall have been ordered, as provided by said act of June 5, 1920, except as hereinafter stated.

4. Restorations of reserved spaces will be made by the Secretary of the Interior pursuant to investigation by the field service of this office, either on his own initiative or following petitions for restoration.

## RESTORATION.

5. The act authorizes restorations upon "application to enter or otherwise" within the discretion of the Secretary of the Interior, and in its administration action will be taken as follows:

(a) Applications to enter will be entertained as the basis for an order of restoration only in cases where the applicant sets up some equitable claim to the land accruing prior to the passage of the act, in which case the application should be accompanied by a sworn corroborated statement as to the facts upon which the alleged claim is founded, in addition to the showing required in section 6 hereof; if the land is unsurveyed, in lieu of the formal application to enter, the claimant should file a certified copy of the location notice filed in the local recording office.

(b) Petitions for restoration will be entertained when presented in accordance with the procedure provided in section 6 hereof. A restoration resulting from such a petition will not give the petitioner a preference right to enter or select the land, unless based upon undoubted equities which accrued prior to the passage of the act.

(c) Restoration may also be made by the department on its own motion, where, after field investigation, it is found that such action is authorized by the statute and required by public interest.

(d) Lands found necessary for harborage uses, or other public purposes, will be excluded from orders of restoration, and included within an appropriate order of withdrawal under the act of June 25, 1910 (36 Stat. 847).

## PETITIONS FOR RESTORATION—SURVEYED LANDS.

6. Any person or persons desiring, may file a petition in duplicate for restoration of any shore space involved, or for waiver of the restriction as to length of the claim, or a petition covering both questions if this be required. Therein must be given a description of the land sought by legal subdivisions, a full statement as to the pending claims on each side of said tract bordering along the water in question, and all essential facts set forth as to the availability of the land sought for harbor purposes, and, if the water be a stream,

all facts must be stated as to its width, depth, and navigability, and the use which is ordinarily made thereof, as well as whether or not such stream or lake is a runway or spawning ground for seagoing fish.

This petition must be executed before the register or receiver or some officer in Alaska authorized to administer oaths and having an official seal, and must be corroborated by the affidavits of at least two witnesses, similarly executed. One copy thereof will be at once referred by the local office to the chief of field division for investigation; the second copy, together with all other papers filed, will be transmitted to the General Land Office with the regular monthly returns. The report by the chief of field division will be forwarded by him to this office direct.

#### UNSURVEYED LANDS.

Any person or persons may file in the district land office a petition, in duplicate, for the restoration of shore space reservations, unsurveyed in whole or in part, and in said petition describe the lands as accurately as possible according to existing regulations, tying the description to known monuments, towns, or natural objects wherever practicable. The petition will be disposed of as above directed for surveyed lands.

7. The act of June 5, 1920, does not modify that clause in the act of May 4, 1898, which provides that a roadway, 60 feet in width, as nearly parallel to the shore line of navigable waters as may be practicable, shall be reserved for the use of the public as a highway.

8. The 80-rod shore space reservation applies only to homestead, soldiers' additional, and trade and manufacturing entries.

#### TRADE AND MANUFACTURING SITES.

*As to surveys  
see 57140 514*

By section 10, act of May 14, 1898 (30 Stat. 409), the following provisions are made:

That any citizen of the United States twenty-one years of age, or any association of such citizens, or any corporation incorporated under the laws of the United States or of any State or Territory now authorized by law to hold lands in the Territories, hereafter in the possession of and occupying public lands in the District of Alaska, in good faith, for the purposes of trade, manufacture, or other productive industry, may each purchase one claim only, not exceeding eighty acres of such land for any one person, association, or corporation, at two dollars and fifty cents per acre, upon submission of proof that said area embraces improvements of the claimant and is needed in the prosecution of such trade, manufacture, or other productive industry, such tract of land not to include mineral or coal lands, and ingress and egress shall be reserved to the public on the waters of all streams, whether navigable or otherwise: *Provided*, That no entry shall be allowed under this act on lands abutting on navigable water of more than eighty rods: *Provided further*, That there shall be reserved by the United States a space of eighty rods in width between tracts sold or entered under the provisions of this act on lands abutting on any navigable stream, inlet, gulf, bay, or seashore, and that the Secretary of the Interior may grant the use of such reserved lands abutting on the water front to any citizen or association of citizens, or to any corporation incorporated under the laws of the United States or under the laws of any State or Territory, for landings and wharves, with the provision that the public shall have access to and proper use of such wharves and landings, at reasonable rates of toll to be prescribed by said Secretary, and a roadway sixty feet in width, parallel to the shore line as near as may be practicable, shall be reserved for the use of the public as a

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highway: *Provided further*, That in case more than one person, association, or corporation shall claim the same tract of land, the person, association, or corporation having the prior claim, by reason of actual possession and continued operation in good faith, shall be entitled to purchase the same, but where several persons are or may be so possessed of parts of the tract applied for the same shall be awarded to them according to their respective interests: *Provided further*, That all claims substantially square in form and lawfully initiated, prior to January twenty-first, eighteen hundred and ninety-eight, by survey or otherwise, under sections twelve and thirteen of the act approved March third, eighteen hundred and ninety-one (Twenty-sixth Statutes at Large, chapter five hundred and sixty-one), may be perfected and patented upon compliance with the provisions of said act, but subject to the requirements and provisions of this act, except as to area, but in no case shall such entry extend along the water front for more than one hundred and sixty rods: *And provided further*, That the Secretary of the Interior shall reserve for the use of the natives of Alaska suitable tracts of land along the water front of any stream, inlet, bay, or seashore for landing places for canoes and other craft used by such natives: *Provided*, That the Annette, Pribilof Islands, and the islands leased or occupied for the propagation of foxes be excepted from the operation of this act.

That all affidavits, testimony, proofs, and other papers provided for by this act and by said act of March third, eighteen hundred and ninety-one, or by any departmental or Executive regulation thereunder, by depositions or otherwise, under commission from the register and receiver of the land office, which may have been or may hereafter be taken and sworn to anywhere in the United States before any court, judge, or other officer authorized by law to administer an oath, shall be admitted in evidence as if taken before the register and receiver of the proper local land office. And thereafter such proof, together with a certified copy of the field notes and plat of the survey of the claim, shall be filed in the office of the surveyor general of the District of Alaska, and if such survey and plat shall be approved by him, certified copies thereof, together with the claimant's application to purchase, shall be filed in the United States land office in the land district in which the claim is situated, whereupon, at the expense of the claimant, the register of such land office shall cause notice of such application to be published for at least sixty days in a newspaper of general circulation published nearest the claim within the District of Alaska, and the applicant shall at the time of filing such field notes, plat, and application to purchase in the land office, as aforesaid, cause a copy of such plat, together with the application to purchase, to be posted upon the claim, and such plat and application shall be kept posted in a conspicuous place on such claim continuously for at least sixty days, and during such period of posting and publication or within thirty days thereafter any person, corporation, or association, having or asserting any adverse interest in or claim to the tract of land or any part thereof sought to be purchased, may file in the land office where such application is pending, under oath, an adverse claim setting forth the nature and extent thereof, and such adverse claimant shall, within sixty days after the filing of such adverse claim, begin action to quiet title in a court of competent jurisdiction within the District of Alaska, and thereafter no patent shall issue for such claim until the final adjudication of the rights of the parties, and such patent shall then be issued in conformity with the final decree of the court.

Procedure under this statute will be regulated in accordance with the instructions that follow:

1. If the land is surveyed after occupancy, and prior to application therefor, the claim may be presented in conformity with the public surveys, or the applicant, if he so elects, may apply for the tract occupied by him regardless of the survey, and proceed as herein prescribed. Claims initiated by occupancy after survey must conform thereto both in occupation and application. No tract taken may abut more than 80 rods of navigable waters, and the same restrictions as to reserved spaces on such waters apply as do in case of homestead entries.

2. Where the land is unsurveyed, or the applicant does not desire to conform to the survey, he must file at the proper local land office

an application in duplicate for entry of the tract occupied by him, describing it by approximate latitude and longitude, and otherwise identifying it with as much certainty as may be done without actual survey, as set forth in the instructions relative to special surveys in Alaska. (See p. 31.) The register and receiver will thereupon note the filing of the application and designate it by serial number, forwarding one copy to the General Land Office, and the other to the chief of field division. They will furnish the applicant with a certificate to the surveyor general that an application has been filed, and that no objection to the survey is known to them. The surveyor general will, if no objection is shown by his records, immediately deliver to the applicant an order for such survey, which will be sufficient authority for any United States deputy surveyor to make a survey of the claim.

3. The survey must be made at the expense of the applicant and no right will be recognized as initiated by the application unless actual work on the survey is begun within 90 days after the receipt by applicant of the order to be furnished him by the surveyor general as above mentioned; moreover, the rights secured thereby will lapse unless the survey is continued to completion without unnecessary delay. Upon completion of the survey the deputy should certify to the field notes and plat, which must then be filed with the surveyor general.

4. If the surveyor general finds the work of survey regular, and that the regulations have been complied with, he will forward the papers to the General Land Office for acceptance. If the Commissioner of the General Land Office finds the survey to be worthy of approval, the Surveyor General will be advised of its acceptance and directed to file in the local land office a certified copy of the plat and field notes. The register and receiver will fix a certain date, and notify the applicant that he must, within the time limited, furnish evidence of posting and publication of notice of his application, together with proof corroborated by two witnesses showing:

First. The actual use and occupancy of the land for which application is made for the purpose of trade, manufacture, or other productive industry; that it embraces the applicant's improvements and is needed in the prosecution of the enterprise.

Second. The date when the land was first so occupied.

Third. The character and value of improvements thereon, and the nature of the trade, business, or productive industry conducted thereon.

Fourth. That the tract applied for does not include mineral or coal lands, and is essentially nonmineral in character.

Fifth. That no portion of said land is occupied or reserved for any purpose by the United States, or occupied or claimed by any natives of Alaska, or occupied as a town site or missionary station, or reserved from sale, and that the tract does not include improvements made by or in possession of another person, association, or corporation.

Sixth. Whether or not the land abuts on any navigable stream, inlet, gulf, bay, or seashore, and if so that it is not within 80 rods of any other tract sold, entered, or claimed under the act of May 14, 1898, as modified by the act of March 3, 1903 (see p. 29), as to reserved spaces.

Seventh. If the application is made for the benefit of an individual, he must prove his citizenship and age, and that he has not entered, or acquired title to any land entered, under the provisions of this act.

Eighth. If the application is made for the benefit of an association it must so appear, and the citizenship and age of each member thereof be shown.

Ninth. If the application is made for the benefit of a corporation, the proof of incorporation must be established by the certificate of the secretary of the State or Territory or other officer having custody of the record of incorporation, and it must be further shown that such corporation is authorized by the law under which it is incorporated and under laws of Alaska to hold lands in the Territory.

Tenth. In case the application is made for the benefit of an association or corporation, it must appear that each member thereof has not entered or acquired title to any land entered under the provisions of this act.

5. All affidavits may be executed before the register or receiver of the land office in the district in which the land is situated, or anywhere in the United States, before the judge of a court or other officer authorized by law to administer oaths. Unless the above evidence is furnished the application will be rejected and the survey canceled.

6. At the expense of the claimant, the register of the local land office will cause the above-mentioned notice of the application to be published for a period of at least 60 days in a paper of established character and general circulation, to be by him designated as being the newspaper published nearest the land, and will also transmit a copy thereof to the chief of field division. The applicant himself must, during the period of publication, cause a copy of the plat, duly authenticated, together with a copy of the application to purchase, to be posted in a conspicuous place upon the claim for at least 60 days. The register will cause a copy of the application to purchase to be posted in his office during the period of publication.

7. During that period, or within 30 days thereafter, any person, corporation, or association having or asserting an adverse interest in, or claim to, the tract of land sought to be purchased, or any part thereof, may file in the land office where such application is pending, under oath, an adverse claim, setting forth the nature and extent thereof; and such adverse claimant shall, within 60 days after said filing, begin action to quiet title in a court of competent jurisdiction within the District of Alaska; and in that event no further action will be taken in the local office upon the application to purchase until the final adjudication of the rights of the parties in the court.

8. If, at the expiration of the period prescribed therefor, no adverse claim has been filed, and no other sufficient objection appears to the proposed purchase, cash certificate will issue for the land in the name of the applicant upon his furnishing proof of publication and posting of the notice as required and making due payment for the land at the rate of \$2.50 per acre. The proof must consist of the affidavit of the publisher or foreman of the designated newspaper, or some other employee authorized to act for the publisher, that the notice (a copy of which must be attached to the affidavit) was pub-

lished for the required period in the regular and entire issue of every number of the paper during the period of publication in the newspaper proper and not in a supplement. Proof of posting on the claim must consist of the affidavits of the applicant and two witnesses, who of their own knowledge know that the plat of survey and application to purchase were posted as required and remained so posted during the required period. The register must certify to the posting of the notice in a conspicuous place in his office during the period of publication.

9. A failure to make payment for the land at the rate of \$2.50 per acre, for a period of three months after the final adjudication of the rights of the parties by the court, or after the period for filing an adverse claim shall have expired, without any such claim being filed, will be deemed an abandonment of the application to purchase.

### SCRIP LOCATIONS.

Aside from the right of the Territory of Alaska to select lands in lieu of tracts to which it may be entitled, under its grant in aid of public schools made by the act of March 4, 1915 (38 Stat. 1214), and which have been lost, no scrip or lieu rights can be located in said Territory except soldiers' additional homestead rights.

### TOWN SITES. *See 51210501*

The establishment of town sites on public lands in Alaska—except along Government railroads—is governed by section 11 of the act of March 3, 1891 (26 Stat. 1095), which provides:

That until otherwise ordered by Congress lands in Alaska may be entered for town-site purposes, for the several use and benefit of the occupants of such town sites, by such trustee or trustees as may be named by the Secretary of the Interior for that purpose, such entries to be made under the provisions of section twenty-three hundred and eighty-seven of the Revised Statutes as near as may be; and when such entries shall have been made the Secretary of the Interior shall provide by regulations for the proper execution of the trust in favor of the inhabitants of the town site, including the survey of the land into lots, according to the spirit and intent of said section twenty-three hundred and eighty-seven of the Revised Statutes, whereby the same results would be reached as though the entry had been made by a county judge and the disposal of the lots in such town site and the proceeds of the sale thereof had been prescribed by the legislative authority of a State or Territory: *Provided*, That no more than six hundred and forty acres shall be embraced in one town-site entry.

The following regulations are prescribed in accordance with said act:

1. If the land is unsurveyed the occupants must, by application to the surveyor general, obtain a survey of the exterior lines of the town site which will be made at Government expense. There must be excluded from the tract to be surveyed and entered for the town site any lands set aside by the district court under section 31 of the act of June 6, 1900 (31 Stat. 321, 332), for use as jail and courthouse sites, also all lands needed for Government purposes or use, together with any existing valid claim initiated under Russian rule.

2. When the survey of the exterior lines has been approved, or if the town site is on surveyed land, a petition to the Secretary of the Interior, signed by a majority of the occupants of the land, will be

filed in the local office for transmittal to the General Land Office requesting the appointment of trustee and the survey of the town site into lots, blocks, and municipal reservations for public use, the expense thereof to be paid from assessments upon the lots occupied and improved on the date of the approval of final subdivisional town-site survey. If found sufficient the Secretary of the Interior will designate an officer of the field service of the General Land Office as a trustee to make entry of the town site, payment for which must be made at rate of \$1.25 per acre. If there are less than 100 inhabitants the area of the town site is limited to 160 acres; if 100 and less than 200, to 320 acres; if more than 200, to 640 acres, this being the maximum area allowed by the statute.

3. The trustee will file his application and notice of intention to make proof, and thereupon the register will issue the usual notice of making proof, to be posted and published at the trustee's expense, for the time and in the manner as in other cases provided, and proof must be made showing occupancy of the tract, number of inhabitants thereon, character of the land, extent, value, and character of improvements, and that the town site does not contain any land occupied by the United States for school or other purposes or land occupied under any existing valid claim initiated under Russian rule.

4. The occupants will advance a sufficient amount of money to pay for the land and the expenses incident to the entry, to be refunded to them when realized from lot assessments. Applications for entry will be subject to contest or protest as in other cases.

5. After the entry is made the town site will be surveyed by a United States deputy surveyor into blocks, lots, streets, alleys, and municipal public reservations. Triplicate copies of the plat of this survey will be made; one copy will be retained by the trustee, one be filed in the local recording office, and one on tracing linen to be for the General Land Office. The expense of such survey will be paid from the appropriation for surveys in Alaska reimbursable from the lot assessments when collected.

6. Indian or native Alaskan occupants who have secured certificates of citizenship under the Territorial laws of Alaska shall be treated in all respects like white citizen occupants; but all land occupied by other Indians or Alaskan natives shall not be assessed nor conveyed by the trustee. In making the subdivisional survey herein required, the surveyor will set apart the possessions occupied by the Indians who are not citizens and appropriately designate them as such upon the triplicate plats of his surveys, but he will not extend any street or alley upon or across such possessions.

7. The trustee will make a valuation of each occupied or improved lot in the town site, and thereupon assess upon such lots and blocks according to their value such rate and sum as will be necessary to pay all expenses incident to the execution of his trust which have accrued up to the time of such levy. More than one assessment may be made if necessary to effect the purpose of said act of Congress and these instructions.

8. On the acceptance of the plat by the General Land Office the trustee will publish a notice that he will, at the end of 30 days from the date thereof, proceed to award the lots applied for, and that all lots for which no applications are filed within 120 days from the date of said notice will be subject to disposition to the highest bidder at

public sale. Only those who were occupants of lots or entitled to such occupancy at the date of the approval of final subdivisional town-site survey, or their assigns thereafter, are entitled to the allotments herein provided. Minority and coverture are not disabilities.

9. Claimants should file their applications for deeds, setting forth the grounds of their claims for each lot applied for, which should be verified by their affidavits and corroborated by two witnesses. Such affidavits may be subscribed and sworn to before any officer authorized to administer oaths.

10. Upon receipt of the patent and payment of the assessments the trustee will issue deeds for the lots. The deeds will be acknowledged before an officer duly authorized to take acknowledgments of deeds at the cost of the grantee. In case of conflicting applications for lots the trustee, if he considers it necessary, may order a hearing, to be conducted in accordance with the rules of practice. No deed will be issued for any lot involved in a contest until the case has been finally closed. Appeals from any decision of the trustee or from decisions of the General Land Office may be taken in the manner provided by the rules of practice.

11. After deeds have been issued to the parties entitled thereto the trustee will publish or post notice that he will sell, at a designated place in the town and at a time named, to be not less than 30 days from date, at public outcry, for cash, to the highest bidder, all lots and tracts remaining unoccupied and unclaimed at the date of the approval of final subdivisional town-site survey, and all lots and tracts claimed and awarded on which the assessments have not been paid at the date of such sale. The notice shall contain a description of the lots and tracts to be sold, made in two separate lists, one containing the lots and tracts unclaimed at the date of the approval of final subdivisional town-site survey and the other the lots and tracts claimed and awarded on which the assessments have not been paid. Should any delinquent allottee, prior to the sale of the lot claimed by him, pay the assessments thereon, together with the pro rata cost of the publication and the cost of acknowledging deed, a deed will be issued to him for such lot, and the lot will not be offered at public sale. Where notice by publication is deemed advisable the notice will be published for 30 days prior to the date of sale, and in any event copies of such notice shall be posted in three conspicuous places within the town site. Each lot must be sold at a fair price, to be determined by the trustee, and he is authorized to reject any and all bids. Lots remaining unsold at the close of the public sale in an unincorporated town may again be offered at a fair price if a sufficient demand appears therefor.

12. Immediately after the public sale the trustee will make and transmit to the General Land Office his final report of his trusteeship, showing all amounts received and paid out and the balance remaining on hand derived from assessments upon the lots and from the public sale. The proceeds derived from such sources, after deducting all expenses, may be used by the trustee on direction of the Secretary of the Interior, where the town is unincorporated, in making public improvements, or, if the town is incorporated such remaining proceeds may be turned over to the municipality for the use and benefit thereof. After the public sale and upon proof of the incorporation of the town, all lots then remaining unsold will

be deeded to the municipality, and all municipal public reserves will, by a separate deed, be conveyed to the municipality in trust for the public purposes for which they were reserved.

13. The trustee shall keep a tract book of the lots and blocks, a record of the deeds issued, a contest docket, and a book of receipts and disbursements. The necessary stationery, blanks, and blank books for his use as trustee will be furnished by the General Land Office upon his requisition therefor.

14. The trustee's duties having been completed, the books of accounts of all his receipts and expenditures, together with a record of his proceedings as hereinbefore provided, with all papers, other books, and everything pertaining to such town site in his possession and all evidence of his official acts shall be transmitted to the General Land Office to become a part of the records thereof, excepting from such papers, however, in case the town is incorporated, the subdivisional plat of the town site, which he will deliver to the municipal authorities of the town, together with a copy of the town-site tract book or books, taking a receipt therefor to be transmitted to the General Land Office.

Special instructions as to receipts and disbursements will be given the trustee on his appointment.

#### ALLOTMENTS TO INDIANS AND ESKIMOS.

The act of May 17, 1906 (34 Stat. 197), provides:

That the Secretary of the Interior is hereby authorized and empowered, in his discretion and under such rules as he may prescribe, to allot not to exceed one hundred and sixty acres of nonmineral land in the District of Alaska to any Indian or Eskimo of full or mixed blood who resides in and is a native of said District, and who is the head of a family or is twenty-one years of age; and the land so allotted shall be deemed the homestead of the allottee and his heirs in perpetuity and shall be inalienable and nontaxable until otherwise provided by Congress. Any person qualified for an allotment as aforesaid shall have the preference right to secure by allotment the nonmineral land occupied by him, not exceeding one hundred and sixty acres.

1. This proceeding will be initiated by a written application to the register and receiver, signed by the applicant and describing the location and extent of the tract applied for, and, if unsurveyed, by as accurate a description as possible by metes and bounds, and natural objects, and its position with reference to rivers, creeks, mountains or mountain peaks, towns, or other prominent topographical points of natural objects or monuments, giving the distances and directions as accurately as possible, especially with reference to any well-known trail to a town or mining camp, or to a river or mountain appearing on the map of Alaska. Notice of the application should be posted upon the land, describing the tract applied for, in the terms employed in the application, and a copy of such notice should accompany the application. If the applicant is unable to write his signature, it is desired that his thumb print to the application be obtained, in preference to his signature by mark, his thumb print to be witnessed by two persons. Allotments will not be made on tracts reserved by the United States as shore spaces under the act of March 3, 1903 (32 Stat. 1028), or within national forests, unless founded on actual occupancy prior to the establishment of the forest. Reserved shore spaces eliminated under the pro-

visions of the act of June 5, 1920 (41 Stat. 1059), may, in the discretion of the Secretary of the Interior, be allotted under the terms of said act of May 17, 1906, and these regulations, and the terms and provisions of said act of June 5, 1920, and instructions thereunder.

2. The applicant must also file his or her affidavit of qualification under the statute, and if claiming under the preference-right clause, the date of the beginning of his occupancy must be given, and its continuous nature stated.

3. This must be corroborated by an affidavit of two witnesses, who may be Indians or Eskimos. A nonmineral affidavit must also be filed by the applicant, sworn to only on personal knowledge and not on information and belief.

4. The affidavits may be sworn to before the proper register or receiver, or any officer authorized to administer oaths and having a seal. If the application is made by a woman, she must state in her affidavit whether she is single or married, and if married must show what constitutes her the head of a family, as it is only in exceptional cases that a married woman is entitled to an allotment under this act.

5. The register and receiver will receive and suspend applications for allotments filed under this act, number such applications in accordance with the circular of August 9, 1918 (46 L. D. 513), and note the same on the schedules forwarded at the end of the month, as required by said circular, giving in the "Remarks" column the date of transmittal to the chief of field division. Where the application is found by the local land officers to be complete in all respects, as hereinbefore required, is not rejected by them for any reason, and is received, noted, and suspended by them to await completion of the hereinafter-mentioned proceedings, it operates as a segregation of the land. All claims for land presented to the register and receiver subsequent to the filing of such an application which conflict in whole or in part with such application for the land therein described shall be rejected.

6. The register and receiver will assist applicants in the preparation of their papers, as far as practicable, and, as the act makes no provision for any fees for filing, will make no charge in any of these cases.

7. The application for allotment and all papers filed in connection therewith will, when such application is found satisfactory to the register and receiver and favorably disposed of by them as provided for in paragraph 5 hereof, be referred by the local office to the chief of Alaska field division, who will dispose of them as hereinafter set forth.

Upon receipt of the record from the local office, the chief of field division will call on the district superintendent of the United States Bureau of Education for the district in which the proposed allotment is situated for a report covering such information as he may have in regard to the allotment, and particularly covering the following points:

(a) The location of the land, if necessary, to furnish a more accurate description than given in the application.

(b) The special value of the tract, either for agricultural uses or fishing grounds.

(c) What, if any, residence has been maintained on the tract by the applicant.

- (d) The value and character of all improvements thereon.
- (e) The fitness of the land as a permanent home for the allottee.
- (f) The competency of the applicant to manage his own affairs.
- (g) The presence or absence of any adverse claims and, if any such claims exist, a description thereof.
- (h) The proximity of the claim applied for to other claims under said act of May 17, 1906.

(i) Such other information as may serve to aid in determining whether the application should be allowed, either in whole or in part, together with his recommendation as to the proper action in the premises.

8. Upon receipt of favorable reports from the chief of field division and district superintendent covering allotment applications hereafter filed, embracing lands covered by the public survey, the register and receiver may, all else being regular, and no valid objections thereto being apparent, allow the same, notice of which, by special letter, reading substantially as follows:

Your application under the act of May 17, 1906 (34 Stat. 197), No. \_\_\_\_\_, for \_\_\_\_\_, has been placed of record in this office and forwarded to the General Land Office.

This action segregates the land from the public domain, and no other application can be allowed therefor or settlement rights attach during the life of this application;

should be given to the applicant. Immediately upon the issuance of said notice copy thereof, appropriately marked, should be forwarded to each, the district superintendent, and the Commissioner of the General Land Office.

9. Upon the receipt of the report of the district superintendent, in case of an application for unsurveyed land, the chief of field division will, if in his judgment the report is sufficient, furnish or cause to be furnished by a special agent, as soon as may be convenient, and with as little expense to the Government as possible, and, except in the matter of furnishing and installing the listing description monuments, without expense to the applicant, a listing description of the tract applied for. As basis for this listing description the land should be marked with substantial corners, properly installed and witnessed, uniformly marked and, except as provided for in paragraph 12 hereof, corner No. 1 thereof tied to the nearest location or mineral monument or corner of the public-land survey or other official patented survey if within a reasonable distance. The listing description must show that the land is being taken in rectangular form and with true cardinal courses as near as they can be determined.

One of the aforesaid corners, preferably corner post No. 1, may be tied to the official survey of an approved allotment which has been properly tied to some established survey monument or corner of the public-land survey.

10. Except for the protection of preference rights acquired by actual occupancy, the land applied for must be taken by the applicant in rectangular form, if practicable, and when doing the work the basis of the aforesaid listing description, the special agent must do such work in such form, if practicable, and the lines of his said work follow the true cardinal points as nearly as they may be determined, unless one or more of the boundaries be a navigable or

meanderable stream, and, except in cases of preference rights acquired by actual occupancy, no application under said act will be favorably considered which embraces tracts of land situate upon both sides of a salmon stream or navigable or meanderable body of water. The land must be nonmineral in character, and no claim whatever may include in excess of 160 acres of such land.

11. Where the above referred to corner post is not tied to a corner of the public survey, but is tied to a location or mineral monument or one of the official surveys referred to in paragraph 9 hereof, the agent's returns should contain a description of the location or mineral monument to which the corner, preferably corner No. 1, of the involved land is tied, by giving its latitude and longitude, and its position with reference to rivers, creeks, mountains or mountain peaks, towns, or other permanent topographical points or natural objects or monuments, giving the distances and directions as nearly accurate as possible, especially with reference to any well-known trail to a town or mining camp, or to a river or mountain appearing upon the map of Alaska, which description shall appear in the aforesaid returns.

Where the corner post, preferably No. 1, is tied to one of the official surveys mentioned in paragraph 9 hereof the location of such post corner with relation to the other monuments of the involved land and the relation of such post to the mineral monument to which the same is tied should be given, together with the other data enumerated in this paragraph concerning the description and position of the mineral monument.

The description of such monuments should be obtained from the surveyor general and appear in a paragraph of the returns separate from the description of the courses and distances herein authorized to be furnished by the agent.

12. In case the land is situated beyond a reasonable distance from a corner of the public survey or location or mineral monument or other survey mentioned in paragraph 9 hereof the location of the land with reference to known rivers, creeks, mountains, towns, trails, mining camps, or other permanent topographic features or natural objects or permanent monuments may and should be shown in the special agent's above-mentioned work and in his returns and be depicted on the map of the section of Alaska in which the allotment is situated, which should accompany his said returns.

13. The special agent will after the service aforesaid shall have been performed by him make report thereof to the chief of field division.

This report in sextuplicate should be typewritten, cover all the field work done in the acquisition of and as basis for the foregoing listing description, and contain such a description of the involved land and report of the work done in connection with obtaining the listing description as will enable the Government and all parties interested to readily ascertain the location of said land from said report, even though all visible marks or other physical evidence of the boundaries may have been entirely obliterated. The report should be accompanied by a sketch, signed and dated by the special agent, depicting the boundaries of the land and the position of same with relation to well-known natural and other objects, the location

and description of which should be fully and accurately stated in the agent's returns.

The returns and sketch or diagram above referred to should each bear the same date of approval.

14. Immediately upon receipt of the above report and diagram from the special agent the chief of field division will, if he approves the same, transmit three copies thereof to the register and receiver within whose land district the premises are situated and one copy thereof to the surveyor general.

15. The surveyor general will upon receipt of the report and sketch note same in a book to be kept for such purpose and, where practicable, note the location of the land on the district sheets of his office in pencil until such time as an official survey thereof shall be ordered or final disposition is made of the allotment adverse to the applicant. Information concerning the status of the allotment application may be obtained by the surveyor general from the proper local land officers. The chief of field division is also directed in those cases where he approves the returns aforesaid made by the special agent to amend over his signature the allotment application to conform with the description of the land referred to in said returns as furnished by the special agent's report and forward said application thus amended and conformed to the General Land Office properly indorsed so as to show the changes in description therein and the date when made. The original report or returns made by the special agent should be forwarded by the chief of field division to the General Land Office at the same time the allotment application amended and conformed as hereinbefore directed is forwarded. He will retain in his files the remaining carbon copy of said returns. The report of the district superintendent, approved by the chief of field division in cases where the same meets with his approval, should also be transmitted to the General Land Office at the same time the amended application is forwarded as hereinbefore directed, together with such suggestions as to the application as may seem to him appropriate.

16. The directions herein contained relative to listing descriptions pursuant to field work done by special agents of the lands applied for by an Indian or Eskimo are hereby made applicable, as far as appropriate, to those applications which have already been filed, have not been officially surveyed or approved by the department, and which are not in condition to be recommended to the department for approval.

17. The register and receiver, as soon as they shall have received the aforesaid copies of diagrams and notes from the chief of field division, will appropriately note their records so as to show the location, as shown by the listing description aforesaid, of the lands applied for.

18. Upon making the notations required by paragraph 17 hereof so as to further conform the application to the description thus furnished by the chief of field division, the register and receiver will relieve the application from suspension and place the same, as thus amended, of record, all else being regular, immediately reporting to this office by special letter their action in the premises and the date thereof. Notice of the above action of the local land officers should also be given, in writing, to the applicant and to the district super-

intendent of the United States Bureau of Education for the district in which the land thus applied for is situated, and each, the said applicant and the said superintendent, should be furnished with a copy of the returns or listing description, including diagram, furnished to the register and receiver by the chief of field division as aforesaid. The copy of the special agent's notes furnished the register and receiver by the chief of the field division should be retained by them until the application is finally disposed of, whereupon same should be forwarded by special letter to the General Land Office, with appropriate remarks.

19. The removal of the suspension aforesaid, amendment of the application in the manner and particulars heretofore and herein-after referred to, and placing of applications of record do not necessarily mean that the applications for allotment will be approved. The indicated action simply further segregates and continues to segregate the land from subsequent conflicting applications therefor until the Secretary of the Interior, in his discretion, decides either to approve or disapprove the application or applications for allotment.

20. Except in cases of surveys already made and approved pursuant to prior regulations and authorizations, and which are free from objections, and also, except in special cases, where special instructions for the survey of the unsurveyed land applied for are issued, it shall be the duty of the register and receiver, upon the filing of the township plat in their office and upon ascertaining, where necessary, from the surveyor general whether his records (see par. 15, supra) disclose any allotment applications within the township (and provided the allotment application still stands of record in their office), to notify the applicant and the said superintendent thereof, each by registered letter, and to require the adjustment of the claim to the public survey within 90 days.

In default of action by the parties notified, the register and receiver will promptly, and as accurately as the records will permit, adjust the claim to the public-land survey and report their action to the General Land Office.

The said adjustment shall embrace such subdivisions and parts of subdivisions as shall include all of the applicant's improvements and possessions, if possible.

21. If the Commissioner of the General Land Office, upon the entire record submitted, shall find the application meritorious, in whole or in part, he will, not earlier than five years from and after the date when the said application shall have been adjusted to the public-land survey, unless otherwise directed, submit the same to the Secretary of the Interior for his approval. In special cases, however, and without being specially directed so to do, the commissioner may, if upon the entire record submitted he shall find the application meritorious, in whole or in part, submit the same to the Secretary of the Interior for his approval as aforesaid, and if so approved, special instructions for the survey thereof will then issue in accordance with the terms of the approval. Where such special cases are taken up, considered, submitted, and approved, and special instructions for their survey are issued in accordance with the terms of the approval, such cases or allotments shall be subject to the same requirements as to methods of survey, cardinal courses, and permanent markings of boundaries, except for the protection of pref-

erence rights acquired by actual occupancy, as land surveyed under United States laws in Alaska in general, in accordance with the instructions governing lands thus surveyed.

22. Allotment applications hereafter filed embracing lands covered by the public survey and allowed by the local land officers will also not be submitted to the Secretary of the Interior for his approval earlier than five years from the date of their allowance by the register and receiver as aforesaid, and not then until the hereinbefore referred to reports shall have first been made to the Commissioner of the General Land Office.

23. A schedule of all approved allotments shall be kept of record in the General Land Office; and, as the act makes no provisions for a patent, a certificate will issue showing the approval of the allotment (and the survey thereof, if surveyed) for delivery to the allottee.

24. Hereafter the register and receiver will require each person applying to enter or in any manner acquire title to any lands under any laws of the United States, except the homestead law, to file a corroborated affidavit to the effect that none of the lands covered by his application are embraced in any pending application for an allotment under this act or in any pending allotment, and that no part of such lands is in the bona fide legal possession of or is occupied by any Indian or native except the applicant. Persons applying for the right to cut timber under section 11, act of May 14, 1898 (30 Stat. 414), may, however, substitute for the corroborated affidavit a statement signed by the applicant and duly attested by two witnesses, setting forth the above facts.

25. If the report hereinbefore mentioned of the district superintendent to the chief of field division does not fully cover all the facts, the chief of field division will either return it to the district superintendent for further information or direct an investigation by a special agent of his office, as in his judgment may be deemed best; and, moreover, whether he approves or disapproves the recommendations made in the report of the district superintendent, he will transmit same to the Commissioner of the General Land Office with such suggestions as to the application as may seem to him appropriate.

26. Appropriate forms for the use of applicants under this act have been prepared.

27. Except as herein provided for, all regulations under said act of May 17, 1906, in conflict herewith are hereby revoked.

#### SPECIAL AFFIDAVIT.

The register and receiver will require each person applying to enter or in any manner acquire title to any of the lands in Alaska, under any law of the United States, "except the homestead law (the rights of the Indians being protected by the statement in the regular homestead affidavit that the lands are not occupied and improved by any Indian)," to file a corroborated affidavit to the effect that none of the lands covered by his application are embraced in any pending application for an allotment under the act of May 17, 1906 (34 Stat. 197), or in any pending allotment; that no part of said land was at the date of the location of the land claimed under the mining law occupied or claimed by any Indian, whose occupancy or claim ex-

isted on the date of the acts granting to natives of Alaska the right to hold land used, occupied, or claimed by them (acts of Congress of May 17, 1884, 23 Stat. 24, and June 6, 1900, 31 Stat. 330), and had been continued down to and including date of location; that such land is in the bona fide legal possession of the applicant; and that no part of such land is in the bona fide legal possession of or is occupied by any Indian or native.

### MISSION CLAIMS.

The act of June 6, 1900 (31 Stat. 330), section 27, provides:

The Indians or persons conducting schools or missions in the district shall not be disturbed in the possession of any lands now actually in their use and occupation, and the land at any station not exceeding six hundred and forty acres, occupied as mission stations among the Indian tribes in the section, with the improvements thereon erected by or for such societies, shall be continued in the occupancy of the several religious societies to which the missionary stations respectively belong, and the Secretary of the Interior is hereby directed to have such lands surveyed in compact form as nearly as practicable and patents issued for the same to the several societies to which they belong, but nothing contained in this act shall be construed to put in force in the district the general land laws of the United States.

Under the terms of said act any organized religious society that was maintaining a missionary station in the Territory of Alaska on June 6, 1900, may apply to the surveyor general of Alaska for the survey of the land so occupied.

The application should be made by the duly authorized representative of the society, whose authority to act should appear.

If the society is incorporated, evidence of the incorporation should be furnished, and application should be made in the corporate name of the society; if not incorporated, the nature of the association and its formation and purpose should be set out, and the application should be made in the name of three or more trustees, as such, all of whom must be members of the association or organization.

The application for survey must describe as specifically as possible the location of the claim, in connection with surrounding monuments or objects, so that it may be readily identified, and must be accompanied with proof, which may consist of affidavits duly corroborated by two witnesses, showing:

1. The actual use of the land for missionary purposes and that it embraces the improvements of the applicant society or organization.
2. The date when the land was first so occupied and the extent and character of the occupation.
3. The character and value of the improvements.
4. That no portion of the land is held adversely to the society under rights of prior inception.

The survey will include only such lands, taken in a compact form, as were actually used and occupied for missionary purposes June 6, 1900, not to exceed in any instance 640 acres, and the area will not be extended to embrace lands taken after that date.

When the survey has been made and accepted, in accordance with existing practice governing the survey of sites for trade and manufacturing purposes, certified copies of the field notes and plat with the original proof must be filed in the local land office, and the

register will thereupon issue the proper certificate. In the event applications for surveys have been filed with the surveyor general without the required proof, such proof must be furnished before the issuance of patent.

### PARKS AND CEMETERIES FOR CITIES AND TOWNS.

The act of Congress approved September 30, 1890 (26 Stat. 502), made the following provisions for the purchase of parks and cemeteries:

That incorporated cities and towns shall have the right, under rules and regulations prescribed by the Secretary of the Interior, to purchase for cemetery and park purposes not exceeding one quarter section of public lands not reserved for public use, such lands to be within three miles of such cities or towns: *Provided*, That when such city or town is situated within a mining district the land proposed to be taken under this act shall be considered as mineral lands, and patent to such land shall not authorize such city or town to extract mineral therefrom, but all such mineral shall be reserved to the United States, and such reservation shall be entered in such patent.

This act is held applicable to the Territory of Alaska (city of Juneau, 36 L. D. 264).

The right of entry under said act is restricted to incorporated cities and towns, and such cities and towns are allowed to make entries of tracts of unreserved and unappropriated public land, by Government subdivisions, not exceeding a quarter section in area, all of which must lie within 3 miles of the corporate limits of the city or town for which the entries are made.

*Where on unsurveyed land.*—If the public surveys have not been extended over the lands sought by any city or town under the provisions of said act, it will first be necessary for the proper corporate authority to apply to the surveyor general for a special survey of the exterior lines of such tract, the cost of which will be paid out of the current appropriation for "surveying the public lands."

*Application and proof.*—An application for the purposes indicated herein can only be made by the municipal authorities of an incorporated city or town; and in all cases the entries will be made and patents issued to the municipality in its corporate name, for the specific purpose or purposes mentioned in said act.

The land must be paid for at the Government price per acre, after proof has been furnished satisfactorily showing—

First. Thirty days' publication of notice of intention to make entry, in the same manner as in homestead and other cases.

Second. The official character and authority of the officer or officers making the entry.

Third. A certificate of the officer having custody of the record of incorporation, setting forth the fact and date of incorporation of the city or town by which entry is to be made, and the extent and location of its corporate limits.

Fourth. The testimony of the applicant and two published witnesses to the effect that the land applied for is vacant and unappropriated by any other party, and as to whether the same is either mineral in character or located within an organized mining district or within a mining region.

Fifth. In case the land applied for is described by metes and bounds, as established by a special survey of the same, that the appli-

cant and two of the published witnesses have testified from personal knowledge obtained by observation and measurements that the land to be entered is wholly within 3 miles of the corporate limits of the city or town for which entry is to be made.

*Certificates.*—Where the proof shows that the land is mineral in character, located in a mining district, or is within a region known as mineral lands, the certificate of entry shall contain the following proviso:

*Provided*, That no title shall be hereby acquired to any mineral deposits within the limits of the above-described tract of land, all such deposits therein being reserved as the property of the United States.

### CEMETERIES ACQUIRED BY ASSOCIATIONS OR PRIVATE CORPORATIONS.

The act of Congress approved March 1, 1907 (34 Stat. 1052), authorizes acquisition of title for cemetery purposes as follows:

That the Secretary of the Interior be, and he is hereby, authorized to sell and convey to any religious or fraternal association, or private corporation, empowered by the laws under which such corporation or association is organized or incorporated to hold real estate for cemetery purposes, not to exceed eighty acres of any unappropriated nonmineral public lands of the United States for cemetery purposes, upon the payment therefor by such corporation or association of the sum of not less than one dollar and twenty-five cents per acre: *Provided*, That title to any land disposed of under the provisions of this act shall revert to the United States, should the land or any part thereof be sold or cease to be used for the purpose herein provided.

This act is applicable to Alaska.

*Who may enter.*—The right to purchase public land for cemetery purposes is limited to religious, fraternal, and private corporations or associations, empowered to hold real estate for cemetery purposes by the laws under which they are organized. Such corporation or association shall be allowed to make but one entry of not more than 80 acres of contiguous tracts by Government subdivisions of nonmineral, unreserved, and unappropriated public land.

*Where on unsurveyed land.*—If the public surveys have not been extended over the land so sought to be entered, the corporation or association should apply to the surveyor general for a special survey of the exterior lines of the tract desired, the cost of which will be paid out of the current appropriation for "surveying the public lands."

The proof must satisfactorily show:

First. Thirty days' publication of notice of intention to make entry, in the same manner as in homestead and other cases.

Second. The official character of the officer or officers applying on behalf of the association or corporation to make the entry, and his or their express authority to do so conferred by action of the association or corporation.

Third. A copy of the record, certified by the officer having charge thereof, showing the due incorporation and organization and date thereof of the association or corporation and its location and address. The law under which it is organized and by which it derives its authority to hold real estate for cemetery purposes must also be cited.

Fourth. That the land applied for is nonmineral, vacant, and unappropriated public land, which must be shown by the testimony of the applicant and two of the advertised witnesses.

*Price.*—The land must be paid for at such price per acre as shall be determined by the Commissioner of the General Land Office, provided that in no case shall the price be less than \$1.25 per acre.

Entries under this act must issue to the association or corporation in its corporate name, and the granting clause in the certificate should state that the patent to be issued for the tract described is "for cemetery purposes, subject to reversion 'to the United States should the land or any part thereof be sold or cease to be used for the purpose' in said act provided." Inasmuch, however, as the commissioner of this office determines the amount of the purchase price under the existing conditions in each particular case, the register and receiver will, when proof is made to their satisfaction, immediately forward such proof to this office with their recommendation thereon without issuing the final papers. If this office finds the proof satisfactory, the commissioner will fix the purchase price, and the local officers will, on being notified thereof and no objection appearing thereto in their office, notify the applicant of the amount required and allow him 30 days from service of such notice to pay such purchase price, and on receipt thereof the entry will be issued.

### SALE AND USE OF TIMBER UPON PUBLIC LANDS

Section 11, act of May 14, 1898 (30 Stat. 414), provides:

SEC. 11. That the Secretary of the Interior, under such rules and regulations as he may prescribe, may cause to be appraised the timber or any part thereof upon public lands in the District of Alaska, and may from time to time sell so much thereof as he may deem proper for not less than the appraised value thereof, in such quantities to each purchaser as he shall prescribe, to be used in the District of Alaska, but not for export therefrom. And such sales shall at all times be limited to actual necessities for consumption in the District from year to year, and payment for such timber shall be made to the receiver of public moneys of the local land office of the land district in which said timber may be sold, under such rules and regulations as the Secretary of the Interior may prescribe, and the moneys arising therefrom shall be accounted for by the receiver of such land office to the Commissioner of the General Land Office in a separate account, and shall be covered into the Treasury. The Secretary of the Interior may permit, under regulations to be prescribed by him, the use of timber found upon the public lands in said District of Alaska by actual settlers, residents, individual miners, and prospectors for minerals, for firewood, fencing, buildings, mining, prospecting, and for domestic purposes, as may actually be needed by such persons for such purposes.

The act authorizes the Secretary of the Interior (*a*) to sell timber to individuals, associations, and corporations, and (*b*) to permit the free use of timber by actual settlers, residents, individual miners, and prospectors for minerals, for firewood, fencing, buildings, mining, prospecting, and for domestic purposes. The act has reference only to timber upon vacant, unreserved public lands, outside of the limits of national forests, and does not permit of the exporting of the timber out of the Territory of Alaska. The free-use privilege is not extended to associations and corporations.

Pursuant to the authority conferred upon him, the Secretary of the Interior has caused the following rules and regulations to be promulgated:

1. *Limited free use by settlers, etc.*—Persons designated in the last sentence of section 11, act of May 14, 1898, may go upon the vacant, unreserved public lands and take in amount not exceeding

a total of 100,000 feet, board measure, or 200 cords, in any one calendar year, in saw logs, piling, cordwood, or other timber, the aggregate of either of which amount may be taken either in whole in any one of the above classes of timber or in part of one kind and in part another kind or in other kinds, and where a cord is the unit of measure it shall be estimated, in relation with saw timber, in the ratio of 500 feet, board measure, per cord. Where such persons are unable to take such timber in person, they may employ a servant or agent to procure the timber for them. The uses of the timber must be confined to the uses specified in the act. The taking of timber free of charge for sale and speculation is not authorized. Persons who desire to exercise the privileges extended to them in this section are not required to file applications as provided hereinafter, but in order that future complications may be avoided, they must notify the Chief of the Alaskan Field Division, Juneau, Alaska, or the special agent in charge of timber investigations in the district in which the timber is to be cut, by registered letter, of their intention to procure timber under the free-use clause. Each applicant should set forth in his notice the kind and quantity of timber which is to be cut and the use for which it is to be cut and a description of the land on which said cutting is to be done by township and range and by section and sectional subdivisions thereof, if it be surveyed, or by natural objects by which it may be identified if it be unsurveyed. A blank form of notice (Form 4-023 f) has been prepared and may be obtained free of charge upon request from the chief of field division or from the special agents stationed in Alaska.

2. *Sales of timber.*—Timber upon the vacant, unreserved public lands, outside of the limits of national forests, will be sold in such quantities as are actually needed and as will be used from year to year. Sales are not limited to residents of Alaska, but may be made to any individual, association, or corporation, provided that the timber is not to be exported from the Territory, except birch timber and pulp wood.

3. *Applications for purchase—Place to file—Contents.*—Applicants to purchase timber must file with the receiver of the United States land office for the district wherein the lands to be cut over are situated applications in the form prescribed by the Commissioner of the General Land Office (Form 4-023). Blank forms may be obtained free of charge from the local United States land offices at Juneau, Fairbanks, and Nome, or from the special agents of the General Land Office or from the United States commissioners stationed in Alaska, or from the General Land Office, Washington, D. C. Every applicant should read carefully the printed statements and conditions in the application before attaching signature thereto, since he will be held responsible for subscribing to statements as true which he knows or ought to know to be untrue. Before executing an application, an applicant should, if in doubt, ascertain that the lands from which he desires to cut timber are subject to the provisions of the act. The following information must be incorporated in every application in the blank spaces provided for the purpose:

(a) Name or names, post-office address, residence, and business occupation of the applicant or applicants who apply to purchase timber; (b) the amount in board feet, linear feet, or cord unit of meas-

urement of timber it is desired to purchase; (c) the approximate area of the land on which the timber is located; (d) a description by legal subdivision, if surveyed, or by metes and bounds with reference to some permanent natural landmark, if unsurveyed, of the land from which the timber is desired to be cut; (e) the proposed use of the timber and the place where it is to be used; (f) the amount of money deposited with the application and the form; that is, whether in cash, certified check, or postal money order. Each application must be duly witnessed by two witnesses.

4. *Posting notice on the land.*—After transmitting his application to the receiver, the applicant shall, before commencing to cut the timber applied for, post a notice (Form 4-023c), which will be furnished with the application, in some conspicuous place on the land from which the timber is proposed to be cut, describing the land, and designating the amount and kind of timber that has been applied for and the date on or before which the cutting must be completed. Unless the timber is cut and prepared for removal within one year from the date of the filing of the application all rights thereunder will be forfeited. The application contains a statement to the effect that this requirement will be fulfilled, and neglect on the part of the applicant to fulfill it will be deemed a sufficient ground for revocation of the right to cut and remove any timber under the application. The description in the notice should be identical with the description in the application. This requirement has been adopted in order that others who may desire to file applications to purchase timber or to enter the lands may have notice that the timber has been sold.

5. *Minimum price for which timber will be sold—Payment.*—All timber will be sold hereunder at a reasonable stumpage value. The following rates have been fixed as the minimum rates for which the various kinds of timber will be sold: \$1 per 1,000 feet b. m. for Sitka spruce, hemlock, and red cedar; \$2.50 per 1,000 feet b. m. for yellow cedar; one-half cent per linear foot for piling 50 feet or less in length up to a top diameter of 7 inches; three-fourths cent per linear foot for piling between 50 and 80 feet in length up to a top diameter of 8 inches; 1 cent per linear foot for piling over 80 feet in length up to a top diameter of 8 inches; 50 cents per cord for shingle bolts and cooperage stock; 25 cents per cord for wood suitable only for fuel or mine lagging. A deposit in the sum of \$50, in cash, postal money order, or certified check, where the stumpage value, at the minimum rate, of the material applied for equals or exceeds that amount, or in a sum representing the full stumpage value, at the minimum rate, where such value is less than \$50, must be made as an evidence of good faith at the time that the application is filed. If a permit shall afterwards be issued, the deposit will be applied to the purchase price of the timber. If the issuance of a permit shall be denied and no timber shall have been cut under the application, the amount deposited by the applicant will be returned to him.

After an application is allowed the timber to be sold thereunder will be appraised by a special agent of the General Land Office, and after appraisal said special agent will collect the appraised amount in excess of the sum originally deposited in cash, postal money order, or certified check and give to the applicant a memorandum receipt

for the payment, which receipt should be preserved by the applicant until he receives the receiver's official receipt therefor. The special agent will deposit all such moneys, postal money orders, or certified checks with the receiver of public moneys. Official receipts will be issued by the receiver for all payments made by applicants. All postal money orders must be made payable to the order of the receiver and must be drawn on the post office where the office of the receiver is located. Certified checks must be drawn in favor of the receiver on national or State banks or trust companies located in the same city as the depository with which the deposits are to be made, or upon such "out-of-town" banks, the certified checks of which can be cashed by the receiver without cost to the Government. Remittances tendered in any other form than the above-mentioned forms can not be accepted. Postal money orders and certified checks are not to be held as payment for timber until the same are converted into cash by the receiver.

6. *When cutting and removal may begin.*—As soon as the applicant has filed his application with the receiver, made the requisite initial deposit, and posted notice on the land, he may begin to cut and prepare for removal the timber applied for. As soon as practicable after the filing of an application, a field investigation and appraisal will be made by a special agent of the General Land Office. After such investigation and appraisal shall have been made, and after the applicant has paid to the special agent the excess stumpage value, over and above the sum originally deposited, where there is such excess, the special agent will issue a permit (Form 4-023 b), unless he finds that a permit ought not be issued, authorizing the applicant to remove the timber. If for any reason the special agent is unable to make the investigation and appraisal within 60 days after the filing of an application, he will, if he knows of no objection, issue a permit (Form 4-023 b), and the applicant may then remove the timber, provided that he shall first transmit to the receiver the excess stumpage value over and above the sum originally deposited, where there is such excess.

7. *Limitations upon rights acquired under permission to cut timber.*—The permission to cut shall not give the applicant the exclusive right to cut timber from the lands embraced in his application as against any person entitled to the free use of timber under the provisions of the act, unless the area described in the application is limited to 40 acres and, if the lands be unsurveyed, the boundaries thereof are blazed or otherwise marked by him sufficiently to be identified. The cutting of immature timber will not be permitted under these rules and regulations. The timber authorized to be cut under these rules and regulations must be cut and prepared for removal within one year from the date of the filing of the application. Sales of timber will not be authorized unless there is a necessity for the use of the timber within two years from the date of the authorization to cut.

8. *Limitations with reference to area—Exceptions.*—Withdrawals have been made for various purposes from time to time within the Territory of Alaska since its purchase by the United States. These rules and regulations are not applicable to the free use or purchase of timber upon such withdrawn areas, unless an exception be made

in the order of withdrawal or it is evident from the spirit and intent of the withdrawal order that such exception was intended. By the act of March 4, 1915 (38 Stat. 1214), sections 16 and 36 in each township were granted to the Territory for school purposes and section 33 in each township in the Tanana Valley between parallels 64 and 65 degrees of north latitude, and between 145 and 152 degrees of west longitude, and sec. 6, T. 1 S., R. 1 W.; sec. 31, T. 1 N., R. 1 W.; sec. 1, T. 1 S., R. 2 W.; and sec. 36, T. 1 N., R. 2 W., Fairbanks meridian, were reserved in aid of the Territorial agricultural college and school of mines when established by the Territorial Legislature. The timber upon lands reserved for educational purposes will not be subject to disposition hereunder. Alaskan withdrawal No. 1, and Alaska town-sites withdrawals Nos. 1 to 9, inclusive, have been amended so as to permit of the use or purchase of timber within the area of those withdrawals and the Executive orders establishing Alaskan timber reserve No. 1; pursuant to the act of March 12, 1914 (38 Stat. 305), expressly state that such timber as shall not be needed by the Alaskan engineering commission for the construction of Alaskan Government-owned railroads, may be disposed of by the Secretary of the Interior. Persons who desire to use or purchase timber on lands within Alaskan timber reserve No. 1 should first inquire of the Alaskan engineering commission, Seward, Alaska, as to whether or not the particular timber which they desire is needed by that commission, and in the event that said timber is not so needed, applications may be filed for the same in manner as hereinbefore provided. The information to be supplied by the applicant in the fulfillment of the requirement set forth in subdivision (d) section 3 of these rules and regulations should contain statements to the effect that the timber is upon lands within the timber reserve and that the engineering commission will consent to its removal. In such cases applications must be filed irrespective of whether the timber is to be procured under the free-use clause or under the purchase clause of the act.

9. *Indian and Eskimo claims and allotments—Homestead and mining claims.*—All persons desiring to procure timber under these rules and regulations must ascertain whether or not the lands from which they desire to cut are embraced within any allotment approved to an Indian or Eskimo or within any pending application for such allotment, or are within the bona fide legal possession of or occupied by any Indian or Eskimo, and every timber application (Form 4-023) contains a statement to the effect that the lands described in the application are not within such areas, and said statement must be subscribed to by the applicant and be duly witnessed by two witnesses. The cutting of timber on existing homestead, mining, or other claims is not authorized by these rules and regulations, but when a homestead, mining, or other claim shall have been initiated subsequent to the date of the filing of an application hereunder and posting of notice, as required by paragraph 4, such homestead, mining, or other claimant must take the claim, subject to the right of the timber applicant to cut and remove from the lands described in the application and notice the amount of timber purchased under the terms of the application.

10. *Free use of timber for Army posts and other governmental purposes.*—Persons contracting with Government officials to furnish firewood or timber for United States Army posts or for other authorized governmental purposes may procure such firewood or timber from the vacant unreserved public lands free of charge, provided that the contracts do not include any charge for the value of the firewood or timber. The filing of an application is not required, but it is advisable for contractors to file applications in order that future complications with reference to charge of trespass may be avoided; and when applications are filed, the terms of the contract agreement, the use to which the timber is to be put, and a statement to the effect that no charge is to be made for the stumpage value of the material should be incorporated therein, unless the contract with the Government specifically states that no stumpage has been charged it will be presumed that a charge has been made and the contractor must pay stumpage for the wood.

11. *Pulp wood—Exportation authorized.*—The act of February 1, 1905 (33 Stat. 628), authorizes the exportation of pulp wood or wood pulp manufactured from timber in the District of Alaska. Sales of timber for manufacture into this kind of material will be made under these rules and regulations.

12. *Fire-killed and fire-damaged timber.*—The act of March 4, 1913 (37 Stat. 1015), provides for the sale of public timber which was killed or permanently or seriously damaged by forest fires which occurred prior to the date of passage of said act. This provision is applicable to the Territory of Alaska. Separate instructions have been promulgated and are contained in Circular No. 258 (42 L. D. 300). The disposition of this class of timber will also be made under these rules and regulations.

13. *Prevention against waste—Precaution against forest fires.*—The cutting of timber under these rules and regulations shall be done in such a manner as to prevent unnecessary waste. All trees shall be utilized to as low a diameter in the tops as possible, and stumps shall be cut as close to the ground as conditions will permit. All brush, tops, lops, and other forest debris made in felling and removing the timber shall be disposed of as best adapted to the protection of the remaining growth and in such manner as shall be prescribed by the special agent who has charge of the investigation. Every precaution shall be taken to prevent forest fires, and persons taking timber hereunder shall assist in suppressing such fires within the areas covered by their applications.

14. *Examination by special agents.*—At convenient times during cutting, or after any sale, the special agent will examine the lands cut over and submit a report or reports to the Commissioner of the General Land Office as to compliance with the terms of the sale, and if he finds that the cutting is being done in violation of the terms of sale he will immediately stop the cutting and report the matter for action. Special instructions have been issued for the guidance of the special agents who are to appraise timber and supervise its cutting and removal.

15. *Prior circular superseded.*—These rules and regulations supersede the rules and regulations of February 24, 1912, contained in Circular No. 85 (40 L. D. 477).

**BIRCH TIMBER MAY BE EXPORTED.**

The act of June 5, 1920 (41 Stat. 874-917) making appropriations for sundry civil expenses of the Government, contained a provision that "Hereafter birch timber may be exported from Alaska."

It had been reported that there is considerable white birch timber, which is a hardwood and is valuable for the manufacture of furniture, flooring, and finishings, on some of the public lands along and near the line of the Government railroad in the Susitna Valley and also in the Matanuska and Tanana Valleys and in some of the small valleys along the coast. The market in Alaska for this class of timber for manufacturing purposes has been extremely limited and such use as it has been put to has chiefly been for fuel. The provision authorizing its exportation was enacted with the view to encouraging the use of this class of timber for a more appropriate and beneficial purpose, and such timber may be purchased under the following regulations:

(1) Sales of birch timber to be cut for export may be made pursuant to the procedure and under the conditions set forth in the rules and regulations above set forth, where the quantities are such as will be disposed of from year to year. This provision has particular reference to cases where purchases are made by those who do not contemplate large-scale production and expenditure of large sums of money for developing enterprises for the exportation of this class of material.

(2) Sales of birch timber suitable for manufacturing purposes are hereby authorized in quantities, if found available, sufficient to supply a mill or proposed mill for a period of as much as 10 years, when it is satisfactorily shown that the purchaser in good faith intends to develop an enterprise for the cutting of this class of timber for export from Alaska. The amount of timber that any one purchaser will be permitted to purchase under this provision and the period of the contract will be governed by the capacity of the mill and the estimated quantity that it will be capable of producing during the period covered by the contract of sale. When a 10 years' supply is sold, the period within which the same must be cut (10 years) will begin to run from the time that the contract of sale is executed if the manufacturing plant has been built, or from the time that the mill has been constructed and ready to begin operations, if it is to be built, but in no case will more than a two years' deduction be allowed for construction, and each contract shall contain a provision that all rights acquired thereunder shall be forfeited if operations have not been commenced within three years from the date of execution of the contract unless, upon satisfactory showing, the Secretary of the Interior shall, in his discretion, excuse the delay. Commencement of operations in this sense will be construed as a bona fide commencement of actual cutting of timber in quantity sufficient to show that it is the purpose of the purchaser to fulfill the conditions of the contract and that it was not entered into merely for speculative purposes.

(3) Applications to purchase birch timber pursuant to the act of June 5, 1920, *supra*, must be filed in duplicate in the United States land office for the district wherein the lands to be cut over are situated, and should show: (a) Name, post-office address, residence,

and business location of applicant; (b) amount or approximate amount in board feet of timber that the applicant desires to purchase; (c) a description by legal subdivision or subdivisions, if surveyed, or by metes and bounds with reference to some permanent natural landmark, if unsurveyed, and the area or approximate area of the land from which the timber is to be cut, and if the lands are within the area (Alaskan timber reserves) withdrawn pursuant to the act of March 12, 1914 (38 Stat. 305), in aid of the construction of Alaskan Government-owned railroads, it should be so stated, and evidence of consent previously obtained from the Alaskan Engineering Commission should be filed with the application; (d) whether or not the applicant is prepared to commence cutting immediately, and if not approximately how long before timber cutting operations will be commenced; (e) the estimated annual capacity of the mill or proposed mill, and the amount of money invested or to be invested in the establishment of the enterprise, accompanied with evidence as to the financial standing of the applicant and a statement showing the general plan of operation and the purpose for which the timber is to be used. The sum of \$200 must be deposited with each application, as an evidence of good faith, and for the purpose of helping to defray the cost of appraisal. If the sale is consummated, the amount of the deposit will be credited on the purchase price without deduction for the cost of appraisal. All remittances must be in cash, or by certified check or postal money order. No other form of remittance can be accepted.

(4) Immediately upon the filing of an application to purchase birch timber under section 2 of these rules and regulations, a notice shall be published, at the expense of the applicant, in a newspaper designated by the register, published in the vicinity of the land from which the timber is to be cut and most likely to give notice to the general public, once a week for a period of five consecutive weeks, if in a weekly paper, or if in a daily paper for a period of 30 days. The description of the land in the notice must be identical with the description in the application. The register and receiver will post a copy of said notice in a conspicuous place in their office during the period of publication. Upon the execution of a contract the purchaser shall, if the lands from which the timber is to be cut are unsurveyed, cause the boundaries to be blazed or otherwise marked in order that they may be identified. This requirement has been adopted in order that others who may subsequently desire to purchase timber or to settle upon or enter the land may have notice that the timber has been applied for or sold.

(5) The local officers will make appropriate notations upon the records of their office and transmit the application to the Commissioner of the General Land Office and at the same time transmit the duplicate to the chief of the Alaskan field division at Juneau, Alaska, or to a special agent located in the particular land district who shall have been designated by the chief of field division to make appraisals; upon receipt of the same the latter will without delay cause the timber applied for to be examined and appraised. The appraisal rates will be based upon a fair stumpage rate, taking into consideration the quality of the timber and its accessibility to market. In no event will any timber suitable for manufacturing

purposes be appraised at less than \$1 per thousand feet, board measure. The Government reserves the right to reappraise the remaining timber at the expiration of five years from the time that the period within which the timber must be cut begins to run, but in no instance shall the reappraisal be at more than double the rate of the original appraisal. After an examination and appraisal shall have been made, the chief of field division will at once notify the applicant, advising him of the result of the appraisal, and also submit a report to the Commissioner of the General Land Office.

(6) Upon receipt of notice the applicant shall, within 30 days therefrom, enter into a contract with the Government, through the Commissioner of the General Land Office as its agent, subject to the approval of the Secretary, to purchase the timber applied for, pursuant to the rules and regulations of the Department of the Interior pertaining thereto, and shall execute and file therewith a bond with a bonding company listed on an approved list issued by the Treasury Department, as surety, in a sum to equal 50 per cent of the stumpage value of the estimated amount of timber to be cut during each year of the contract. The bond shall be conditioned on the payment for the timber in accordance with the terms of the contract and to the faithful performance of the contract in other respects and to observance of the rules and regulations pursuant to which the sale is made. All contracts and bonds executed hereunder on Forms 4-146 and 4-146a, respectively, must be approved by the Secretary of the Interior.

(7) All contracts shall contain provisions against waste and precaution against forest fires. The Government may reserve the right to insert in a contract a provision authorizing the disposition for local use of birch timber that is not suitable for manufacturing purposes and of timber of other varieties upon the area described in the contract, to another or others pursuant to the provisions of sections 1 and 2 of the regulations under section 14 of the act of May 14, 1898. Contracts entered into under these rules and regulations will also be subject to the right of qualified persons to settle upon or enter the lands under the provisions of the homestead laws, but such settlers or homesteaders shall not have any title to or interest in the timber purchased under the contract or be permitted to interfere with the purchaser's operations incident to the cutting and removal of the timber.

(8) At the expiration of a contract a new contract may be entered into for a period of five years, upon the approval of the Secretary of the Interior where there is sufficient timber available to warrant. Prior good faith of the purchaser and substantial compliance with the conditions of the expired contract will be given consideration with reference to awarding a new contract. A new appraisal shall be made at that time for the purpose of fixing the stumpage price. Further renewals for five-year periods may be made to the same purchaser upon approval of the Secretary of the Interior.

(9) These rules and regulations are not applicable to timber on national forest lands, Indian or Eskimo claims, prior homestead or mining claims, or lands reserved or withdrawn for any purpose, except where the terms of the reservation or withdrawal order permit it.

## GRANTS IN AID OF PUBLIC SCHOOLS.

By the act of March 4, 1915 (38 Stat. 1214), sections numbered 16 and 36 in every township, not known to be mineral in character at the date of acceptance of survey, on which no settlement has been made before the survey of the land in the field, and which have not been sold or otherwise appropriated by authority of Congress, are reserved for the support of the common schools in Alaska.

Section 33 in each township between parallels 64° and 65° of north latitude and between 145° and 152° of west longitude are reserved for the support of a Territorial agricultural college and school of mines.

Where any of said sections are lost to the reservations mentioned, in whole or in part, because of prior settlement or sale, or other appropriation under an act of Congress, or where they are wanting or are fractional in quantity, indemnity lands may be designated and reserved in lieu thereof, as provided in the act of February 28, 1891 (25 Stat. 796). The regulations providing for such selections by the States will be followed in Alaska.

As soon as the survey of a township has been made and accepted, the chief of field division will cause investigation and report to be made as to the character of the land included in the reservation; and where a tract is reported by him as mineral, opportunity will be afforded the proper officers of the Territory to disprove such finding.

The Territory is authorized to provide by law for the leasing of said sections, it being stipulated, however, that no greater area than one section shall be leased to any person, association, or corporation, and that leases shall not be for longer periods than 10 years.

## RIGHTS OF WAY FOR RAILROADS, WAGON ROADS, AND TRAMWAYS.

Sections 2 to 9, inclusive, of the act of May 14, 1898 (30 Stat. 409), relate to rights of way for railroads, wagon roads, and tramways in the Territory of Alaska. These sections provide:

SEC. 2. That the right of way through the lands of the United States in the District of Alaska is hereby granted to any railroad company, duly organized under the laws of any State or Territory or by the Congress of the United States, which may hereafter file for record with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of one hundred feet on each side of the center line of said road; also the right to take from the lands of the United States adjacent to the line of said road, material, earth, stone, and timber necessary for the construction of said railroad; also the right to take for railroad uses, subject to the reservation of all minerals and coal therein, public lands adjacent to said right of way for station buildings, depots, machine shops, side tracks, turnouts, water stations, and terminals, and other legitimate railroad purposes, not to exceed in amount twenty acres for each station, to the extent of one station for each ten miles of its road, excepting at terminals and junction points, which may include additional forty acres, to be limited on navigable waters to eighty rods on the shore line, and with the right to use such additional ground as may in the opinion of the Secretary of the Interior be necessary where there are heavy cuts or fills: *Provided*, That nothing herein contained shall be so construed as to give to such railroad company, its lessees, grantees, or assigns the ownership or use of minerals, including coal, within the limits of its right of way, or of the lands hereby granted: *Provided further*, That all mining operations prosecuted or undertaken within the limits of such right of way or of the lands hereby granted shall, under rules and regulations to be prescribed by

the Secretary of the Interior, be so conducted as not to injure or interfere with the property or operations of the road over its said lands or right of way. And when such railway shall connect with any navigable stream or tide water such company shall have power to construct and maintain necessary piers and wharves for connection with water transportation, subject to the supervision of the Secretary of the Treasury: *Provided*, That nothing in this act contained shall be construed as impairing in any degree the title of any State that may hereafter be erected out of said district, or any part thereof, to tide lands and beds of any of its navigable waters, or the right of such State to regulate the use thereof, nor the right of the United States to resume possession of such lands, it being declared that all such rights shall continue to be held by the United States in trust for the people of any State or States which may hereafter be erected out of said district. The term "navigable waters," as herein used, shall be held to include all tidal waters up to the line of ordinary high tide and all nontidal waters navigable in fact up to the line of ordinary high-water mark. That all charges for the transportation of freight and passengers on railroads in the District of Alaska shall be printed and posted as required by section six of an act to regulate commerce as amended on March second, eighteen hundred and eighty-nine, and such rates shall be subject to revision and modification by the Secretary of the Interior.

SEC. 3. That any railroad company whose right of way, or whose track or roadbed upon such right of way, passes through any canyon, pass, or defile shall not prevent any other railroad company from the use and occupancy of said canyon, pass, or defile for the purposes of its road, in common with the road first located, or the crossing of other railroads at grade; and the location of such right of way through any canyon, pass, or defile shall not cause the disuse of any tramway, wagon road, or other public highway now located therein, nor prevent the location through the same of any such tramway, wagon road, or highway where such tramway, wagon road, or highway may be necessary for the public accommodation; and where any change in the location of such tramway, wagon road, or highway is necessary to permit the passage of such railroad through any canyon, pass, or defile, said railroad company shall, before entering upon the ground occupied by such tramway, wagon road, or highway, cause the same to be reconstructed at its own expense in the most favorable location, and in as perfect a manner as the original road or tramway; *Provided*, That such expenses shall be equitably divided between any number of railroad companies occupying and using the same canyon, pass, or defile, and that where the space is limited the United States district court shall require the road first constructed to allow any other railroad or tramway to pass over its track or tracks through such canyon, pass, or defile on such equitable basis as the said court may prescribe; and all shippers shall be entitled to equal accommodations as to the movement of their freight and without discrimination in favor of any person or corporation: *Provided*, That nothing herein shall be construed as depriving Congress of the right to regulate charges for freight, passengers, and wharfage.

SEC. 4. That where any company, the right of way to which is hereby granted, shall in the course of construction find it necessary to pass over private lands or possessory claims on lands of the United States, condemnation of a right of way across the same may be made in accordance with section three of the act entitled "An act to amend an act entitled 'An act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the Government the use of the same for postal, military, and other purposes, approved July first, eighteen hundred and sixty-two,'" approved July second, eighteen hundred and sixty-four: *Provided further*, That any such company, by filing with the Secretary of the Interior a preliminary actual survey and plat of its proposed route, shall have the right at any time within one year thereafter to file the map and profile of definite location provided for in this act, and such preliminary survey and plat shall, during the said period of one year from the time of filing the same, have the effect to render all the lands on which said preliminary survey and plat shall pass subject to such right of way.

SEC. 5. That any company desiring to secure the benefits of this act shall, within twelve months after filing the preliminary map of location of its road as hereinbefore prescribed, whether upon surveyed or unsurveyed lands, file with the register of the land office for the district where such land is located a map and profile of at least a twenty-mile section of its road or a profile of its entire road if less than twenty miles as definitely fixed, and shall thereafter

each year definitely locate and file a map of such location as aforesaid of not less than twenty miles additional of its line of road until the entire road has been thus definitely located; and upon approval thereof by the Secretary of the Interior the same shall be noted upon the records of said office and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way: *Provided*, That if any section of said road shall not be completed within one year after the definite location of said section so approved, or if the map of definite location be not filed within one year as herein required, or if the entire road shall not be completed within four years from the filing of the map of definite location, the rights herein granted shall be forfeited as to any such uncompleted section of said road, and thereupon shall revert to the United States without further action or declaration; the notation of such uncompleted section upon the records of the land office shall be canceled; and the reservations of such lands for the purposes of said right of way, stations, and terminals shall cease and become null and void without further action.

SEC. 6. That the Secretary of the Interior is hereby authorized to issue permit, by instrument in writing, in conformity with and subject to the restrictions herein contained, unto any responsible person, company, or corporation, for a right of way over the public domain in said district, not to exceed one hundred feet in width, and ground for station and other necessary purposes, not to exceed five acres for each station for each five miles of road, to construct wagon roads and wire rope, aerial, or other tramways, and the privilege of taking all necessary material from the public domain in said district for the construction of said wagon roads or tramways, together with the right, subject to supervision and at rates to be approved by said Secretary, to levy and collect toll or freight and passenger charges on passengers, animals, freight, or vehicles passing over the same for a period not exceeding twenty years, and said Secretary is also authorized to sell to the owner or owners of any such wagon road or tramway, upon the completion thereof, not to exceed twenty acres of public land at each terminus at one dollar and twenty-five cents per acre, such lands when located at or near tide water not to extend more than forty rods in width along the shore line and the title thereto to be upon such expressed conditions as in his judgment may be necessary to protect the public interest, and all minerals, including coal, in such right of way or station grounds shall be reserved to the United States: *Provided*, That such lands may be located concurrently with the line of such road or tramway, and the plat of preliminary survey and the map of definite location shall be filed as in the case of railroads and subject to the same conditions and limitations: *Provided further*, That such rights of way and privileges shall only be enjoyed by or granted to citizens of the United States or companies or corporations organized under the laws of a State or Territory; and such rights and privileges shall be held subject to the right of Congress to alter, amend, repeal, or grant equal rights to others on contiguous or parallel routes. And no right to construct a wagon road on which toll may be collected shall be granted unless it shall first be made to appear to the satisfaction of the Secretary of the Interior that the public convenience requires the construction of such proposed road, and that the expense of making the same available and convenient for public travel will not be less on an average than five hundred dollars per mile: *Provided*, That if the proposed line of road in any case shall be located over any road or trail in common use for public travel, the Secretary of the Interior shall decline to grant such right of way if, in his opinion, the interests of the public would be injuriously affected thereby. Nor shall any right to collect toll upon any wagon road in said district be granted or inure to any persons, corporation, or company until it shall be made to appear to the satisfaction of said Secretary that at least an average of five hundred dollars per mile has been actually expended in constructing such road; and all persons are prohibited from collecting or attempting to collect toll over any wagon road in said district, unless such person or the company or person for whom he acts shall at the time and place the collection is made or attempted to be made possess written authority signed by the Secretary of the Interior, authorizing the collection and specifying the rates of toll: *Provided*, That accurate printed copies of said written authority from the Secretary of the Interior, including toll, freight, and passenger charges thereby approved, shall be kept constantly and conspicuously posted at each station where toll is demanded or collected. And any person, corporation, or company collecting or attempting to collect toll without such written authority from the Secretary of the Interior, or

falling to keep the same posted as herein required, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined for each offense not less than fifty dollars nor more than five hundred dollars, and in default of payment of such fine and costs of prosecution shall be imprisoned in jail not exceeding ninety days, or until such fine and costs of prosecution shall have been paid.

That any person, corporation, or company qualified to construct a wagon road or tramway under the provisions of this act that may heretofore have constructed not less than one mile of road, at a cost of not less than five hundred dollars per mile, or one-half mile of tramway at a cost of not less than five hundred dollars, shall have the prior right to apply for such right of way and for lands at stations and terminals and to obtain the same pursuant to the provisions of this act over and along the line hitherto constructed or actually being improved by the applicant, including wharves connected therewith. That if any party to whom license has been granted to construct such wagon road or tramway shall, for the period of one year, fail, neglect, or refuse to complete the same, the rights herein granted shall be forfeited as to any such uncompleted section of said wagon road or tramway, and thereupon shall revert to the United States without further action or declaration, the notation of such uncompleted section upon the records of the land office shall be canceled, and the reservations of such lands for the purposes of said right of way shall cease and become null and void without further action. And if such road or tramway shall not be kept in good condition for use, the Secretary of the Interior may prohibit the collection of toll thereon pending the making of necessary repairs.

That all mortgages executed by any company acquiring a right of way under this act, upon any portion of its road that may be constructed in said district of Alaska, shall be recorded with the Secretary of the Interior, and the record thereof shall be notice of their execution and shall be a lien upon all the rights and property of said company as therein expressed, and such mortgage shall also be recorded in the office of the Secretary of the district of Alaska and in the office of the Secretary of the State or Territory wherein such company is organized: *Provided*, That all lawful claims of laborers, contractors, subcontractors, or material men, for labor performed or material furnished in the construction of the railroad, tramway, or wagon road shall be a first lien thereon and take precedence of any mortgage or other lien.

SEC. 7. That this act shall not apply to any lands within the limits of any military, park, Indian, or other reservation unless such right of way shall be provided for by act of Congress.

SEC. 8. That Congress hereby reserves the right at any time to alter, amend, or repeal this act or any part thereof; and the right of way herein and hereby authorized shall not be assigned or transferred in any form whatever prior to the construction and completion of at least one-fourth of the proposed mileage of such railroad, wagon road, or tramway, as indicated by the map of definite location, except by mortgages or other liens that may be given or secured thereon to aid in the construction thereof: *Provided*, That where within ninety days after the approval of this act proof is made to the satisfaction of the Secretary of the Interior that actual surveys, evidenced by designated monuments, were made, and the line of a railroad, wagon road, or tramway located thereby, or that actual construction was commenced on the line of any railroad, wagon road, or tramway, prior to January twenty-first, eighteen hundred and ninety-eight, the rights to inure hereunder shall, if the terms of this act are complied with as to such railroad, wagon road, or tramway, relate back to the date when such survey or construction was commenced; and in all conflicts relative to the right of way or other privilege of this act the person, company, or corporation having been first in time in actual survey or construction, as the case may be, shall be deemed first in right.

SEC. 9. That the map and profile of definite location of such railroad, wagon road, or tramway, to be filed as hereinbefore provided, shall, when the line passes over surveyed lands, indicate the location of the road by reference to section or other established survey corners, and where such line passes over unsurveyed lands the location thereon shall be indicated by courses and distances and by references to natural objects and permanent monuments in such manner that the location of the road may be readily determined by reference to descriptions given in connection with said profile map.

1. The grant made by these sections does not convey an estate in fee in the lands used for right of way or lands used for station and terminal facilities. The grant is merely of a right of use for the

necessary and legitimate purposes of the roads, the fee remaining in the United States, except as to lands authorized to be sold under section 6 by the Secretary of the Interior, "upon such expressed conditions as in his judgment may be necessary to protect the public interests." The nature of these conditions will depend upon the public necessities and will be governed by the particular circumstances of each case. These sections authorize the Secretary of the Interior to approve maps and plats affecting unsurveyed as well as surveyed land, and, while it is not obligatory on the part of grantees to file additional maps and plats after survey of the lands, showing connections with the public surveys, and the smallest legal subdivisions of all lands affected, by so doing the grants and the extent thereof could be properly recorded on the records of the land department and readily determined.

2. All persons entering public lands, to part of which a right of way has attached, take the same subject to such right of way, the latter being computed as a part of the area of the tract entered.

3. Whenever any right of way shall pass over private land or possessory claims on lands of the United States, condemnation of the right of way across the same may be made in accordance with the provisions of section 4.

#### INCORPORATED COMPANIES.

4. Any incorporated company desiring to obtain the benefits of these sections is required to file the following papers and maps:

First. A copy of its articles of incorporation duly certified to by the proper officer of the company under its corporate seal, or by the secretary of the State or Territory where organized.

Second. A copy of the State or Territorial law under which the company was organized, with the certificate of the governor or secretary of the State or Territory that the same is the existing law.

Third. When said law directs that the articles of association or other papers connected with the organization be filed with any State or Territorial officer, the certificate of such officer that the same have been filed according to law, with the date of the filing thereof.

Fourth. A certificate from the secretary of the District of Alaska showing that the company has complied with chapter 23, title 3, act of June 6, 1900 (31 Stat. 528), providing a civil code for the District of Alaska.

No forms are prescribed for the above portion of the proofs required, as each case must be governed to some extent by the laws of the State or Territory.

Fifth. The official statement, under seal of the proper officer, that the organization has been completed; that the company is fully authorized to proceed with the construction of the road according to the existing law of the State or Territory where organized. (Form 1, Appendix.)

Sixth. A certificate by the president, under the seal of the company, showing the names and designations of its officers at the date of the filing of the proofs. (Form 2, p. 76.)

Seventh. If certified copies of the existing laws regarding such corporations, and of new laws as passed from time to time, be for-

warded to this office by the governor or secretary of any State or Territory, a company organized in such State or Territory may file, in lieu of the requirements of the second subdivision of this paragraph, a certificate of the governor or secretary of the State or Territory that no change has been made since a given date, not later than that of the laws last forwarded.

Eighth. Maps, field notes, and other papers as hereinafter required.

#### INDIVIDUALS OR ASSOCIATIONS OF INDIVIDUALS.

5. Individuals or associations of individuals making applications for a permit, under section 6, for tramways or wagon roads, are required to file evidence of citizenship. In the case of associations an affidavit must be filed by the principal officer thereof, giving a list of the members, and stating that the list includes all the members. Evidence of citizenship must be furnished for each member of the association. Individuals and associations will also be required to file the maps, field notes, and other papers hereinafter required.

6. All maps and plats must be drawn on tracing linen, in duplicate, and must be strictly conformable to the field notes of the survey thereof, wherever such surveys have been made. The word profile as used in the act is understood to intend a map of alignment. No profile of grades will be required.

7. The maps should show any other road crossed or with which connection is made, and whenever possible the station number on the survey thereof at the point of intersection. All such intersecting roads must be represented in ink of a different color from that used for the line for which the applicant asks right of way. Field notes of the surveys should be written along the line on the map. If the map should be too much crowded to be easily read, then duplicate field notes should be filed separate from the map, and in such form that they may be folded for filing. In such case it will be necessary to place on the map only a sufficient number of station numbers to make it convenient to follow the field notes on the map. Station numbers should also be given on the map in all cases where changes of numbering occur and where known lines of survey, public or otherwise, are crossed, with distance to the nearest permanent monument or other mark on such line. The map must also show the lines of reference of initial, terminal, and intermediate points, with their courses and distances.

When the lines are located on surveyed land, the maps must show the 40-acre subdivisions; when on unsurveyed land, a meridian should be drawn on maps through initial and terminal points and at intervals of not more than 6 miles, intermediate points.

8. Typewritten field notes, with clear carbon copies, are preferred, as they expedite the examination of applications. All monuments and other marks with which connections are made should be fully described, so that they may be easily found. The field notes must be so complete that the line may be retraced on the ground. On account of the conditions existing in Alaska, surveys based wholly on the magnetic needle will not be accepted. In that case a true meridian should be established, as accurately as possible, at the initial point. It should be permanently marked and fully described. The

survey should be based thereon and checked by a meridian similarly fixed at the terminal point and, when the line is a long one, by intermediate meridians at proper intervals. On account of the rapid convergence of the meridians in these latitudes, such intermediate meridians should be established at such intervals as to avoid large discrepancies in bearings. It will probably be found preferable to run by transit deflections from a permanently established line, with frequent and readily recoverable reference lines permanently marked; and in such surveys occasional true bearings should be stated, at least approximately. On all lines of railroad the 10-mile sections should be indicated and numbered, and on maps of tramways and wagon roads the 5-mile sections shall likewise be indicated and numbered.

9. The maps, field notes, and accompanying papers should be filed in the local land office for the district where the proposed right of way is located.

10. Connections should be made with other surveys, public or private, whenever possible; also with mineral monuments and other known and established marks. When a sufficient number of such points are not available to make such connections at least every 6 miles, the surveyor must make connection with natural objects or permanent monuments.

11. Along the line of survey, at least once in every mile, permanent and easily recoverable monuments or marks must be set and connected therewith, in such positions that the construction of the road will not interfere with them. The locations thereof must be indicated on the maps. All reference points must be fully described in the field notes, so that they may be relocated, and the exact point used for reference indicated.

12. The termini of a line of road should be fixed by reference of course and distance to a permanent monument or other definite mark. The initial point of the survey and of station, terminal, and junction grounds should be similarly referred. The maps, field notes, engineer's affidavit, and applicant's certificate (Forms 3 and 4, p. 76) should each show these connections.

13. The engineer's affidavit and applicant's certificate must be written on the map, and must both designate by termini (as in the preceding paragraph) and length in miles and decimals the line of route for which right of way application is made. (See Forms 3 and 4.) Station, terminal, or junction grounds must be described by initial point (as in the preceding paragraph) and area in acres (see Forms 7 and 8, pp. 77-78), when they are located on surveyed land, and the smallest legal subdivision in which they are located should be stated. No changes or additions are allowable in the substance of any forms, except when the essential facts differ from those assumed therein. When the applicant is an individual the word "applicant" should be used instead of "company," and such other changes made as are necessary on this account.

14. Where additional width is desired for railroad right of way on account of heavy cuts or fills, the additional right of way desired should be stated, the reason therefor fully shown, the limits of the additional right of way exactly designated, and any other information furnished that may be necessary to enable the Secretary of the Interior to consider the case before giving it his approval.

15. The preliminary map authorized by the proviso of section 4 will not be required to comply so strictly with the foregoing instructions as maps of definite location; but it is to be observed that they must be based upon an actual survey, and that the more fully they comply with these regulations the better they will serve their object, which is to indicate the lands to be crossed by the final line and to preserve the company's prior right until the approval of its maps of definite location. Unless the preliminary map and field notes are such that the line of survey can be retraced from them on the ground, they will be valueless for the purpose of preserving the company's rights. The preliminary map and field notes should be in duplicate, and should be filed in the local land office in order that proper notations may be made on the records as notice to intending settlers and subsequent applicants for the right of way.

16. The scale of maps showing the line of route should be 2,000 feet to an inch. The maps may, however, be drawn to a scale of 1,000 feet to an inch when necessary, or, in extreme cases, to 500 feet to an inch. No other scales must be used and should be so selected as to avoid making maps inconveniently large for handling. In most cases, by furnishing separate field notes, an increase of scale can be avoided. Plats of station, terminal, and junction grounds, etc., should be drawn on a scale of 500 feet to an inch, and must be filed separately from the line of route. Such plats should show enough of the line of route to indicate the position of the tract with reference thereto.

17. Plats of station, terminal, and junction grounds must be prepared in accordance with the directions for maps of lines of routes. Whenever they are located on or near navigable waters the shore line must be shown, and also the boundaries of any other railroad grounds or other claims located on or near navigable waters within a distance of 80 rods from any point of the tract applied for.

18. All applications for permits made under section 6 of this act should state whether it is proposed to collect toll on the proposed wagon road or tramway; and, in case of wagon roads, the application must be accompanied by satisfactory evidence, corroborated by an affidavit, tending to show that the public convenience requires the construction of the proposed road, and that the expense of making the same available and convenient for public travel will not be less, on an average, than \$500 per mile. In all cases, if the proposed line of road shall be located over any road or trail in common use for public travel, a satisfactory statement, corroborated by affidavit, must be submitted with the application, showing that the interests of the public will not be injuriously affected thereby.

19. When maps are filed the local officers will make such pencil notations on their records as will indicate the location of the proposed right of way as nearly as possible. They should note that the application is pending, giving the date of filing and name of applicant. They must also indorse on each map and other paper the date of filing, over their written signature, transmitting them promptly to the General Land Office.

20. Upon the approval of a map of definite location or station plat by the Secretary of the Interior the duplicate copy will be sent to the local officers, who will make such notations of the approval on

their records, in ink, as will indicate the location of the right of way as accurately as possible.

21. When the road is constructed, an affidavit of the engineer and certificate of the applicant (Forms 5 and 6, p. 77) should be filed in the local land office in duplicate for transmission to the General Land Office. In case of deviations from the map previously approved, whether before or after construction, there must be filed new maps and field notes in full, as herein provided, bearing proper forms, changed to agree with the facts in the case, and the location must be described in the forms as the *amended* survey and the *amended* definite location. In such cases the applicant must file a relinquishment, under seal, of all rights under the former approval as to the portions amended, said relinquishment to take effect when the map of amended definite location is approved by the Secretary of the Interior.

22. Unless the proper evidence of construction is filed within the time prescribed by the act for the construction of each section of the road, appropriate steps will be taken looking to the cancellation of the approval of the right of way and the notations thereof on the records.

#### CHARGES FOR TRANSPORTATION OF PASSENGERS AND FREIGHT.

23. In the case of a wagon road or tramway built under permit issued under section 6 of this act, upon which it is proposed to collect toll, a printed schedule of the rates for freight and passengers should also be filed with the Commissioner of the General Land Office for submission to the Secretary of the Interior for his consideration and approval at least 60 days before the road is to be opened to traffic, in order to allow a sufficient time for consideration, inasmuch as by section 6 it is made a misdemeanor to collect toll without written authority from the Secretary of the Interior. In the case of a wagon road satisfactory evidence, corroborated by affidavit, must be submitted with said schedule, showing that at least an average of \$500 per mile has been actually expended in constructing such road. These schedules must be submitted in duplicate, one copy of which, bearing the approval of the Secretary of the Interior, will be returned to the applicant if found satisfactory. Said schedules shall be plainly printed in large type.

Schedules of passenger and freight rates on railroads should be filed with the Interstate Commerce Commission.

#### FORMS FOR DUE PROOFS AND VERIFICATION OF MAPS OF RIGHT OF WAY FOR RAILROADS, TRAMWAYS, WAGON ROADS, ETC.

##### FORM 1.

I, \_\_\_\_\_, secretary (or president) of the \_\_\_\_\_ company, do hereby certify that the organization of said company has been completed; that the company is fully authorized to proceed with construction according to the existing laws of the State (or Territory) of \_\_\_\_\_; and that the copy of the articles of association (or incorporation) of the company filed in the Department of the Interior under the act of May 14, 1898 (30 Stat. 409), is a true and correct copy of the same.

In witness whereof I have hereunto set my name and the corporate seal of the company.

[SEAL OF COMPANY.]

\_\_\_\_\_ of the \_\_\_\_\_ Company.

## FORM 2.

STATE OF \_\_\_\_\_,  
County of \_\_\_\_\_, ss:

I, \_\_\_\_\_, do certify that I am the president of the \_\_\_\_\_ Company, and that the following is a true list of the officers of the said company, with the full name and official designation of each, to wit: (Here insert the full name and official designation of each officer.)

[SEAL OF COMPANY.]

\_\_\_\_\_  
President of Company.

## FORM 3.

STATE OF \_\_\_\_\_,  
County of \_\_\_\_\_, ss:

\_\_\_\_\_, being duly sworn, says he is the chief engineer of (or is the person employed to make the survey by) the \_\_\_\_\_ company; that the survey of the said company's line of (railroad, tramway, or wagon road) described as follows: (Here describe the line of route as required by paragraph 12), a length of \_\_\_\_\_ miles, was made by him (or under his direction) as chief engineer of (or as surveyor employed by) the company and under its authority, commencing on the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, and ending on the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_; that the survey of the said land is accurately represented on this map and by the accompanying field notes; and that this proposed right of way does not lie within 4 rods of the shore of any navigable waters, except as shown on this map. (In the case of a tramway or wagon road, add the following: The said line of road does not lie upon nor cross any road or trail in common use for public travel except as shown on this map.)

Sworn and subscribed to before me this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_.

[SEAL.]

\_\_\_\_\_  
Notary Public.

## FORM 4.

I, \_\_\_\_\_, do hereby certify that I am president of the \_\_\_\_\_ company; that \_\_\_\_\_, who subscribed the accompanying affidavit, is the chief engineer of (or was employed to make the survey by) the said company; that the survey of the said (railroad, tramway, or wagon road), as accurately represented on this map and by the accompanying field notes, was made under authority of the company; that the company is duly authorized by its articles of incorporation to construct the said (railroad, tramway, or wagon road) upon the location shown upon this map; that the said survey as represented on this map and by said field notes was adopted by resolution of its board of directors on the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, as the definite location of the said (railroad, tramway, or wagon road) described as follows: (Describe as in Form 3); that this proposed right of way does not lie within 4 rods of the shore of any navigable waters, except as shown on this map, and that this map has been prepared to be filed in order to obtain the benefits of sections 2 to 9, inclusive, of the act of Congress approved May 14, 1898, entitled "An act extending the homestead laws and providing for right of way for railroads in the District of Alaska, and for other purposes." "I further certify that the said (railroad or tramway) is to be used as a common carrier of freight and passengers.

\_\_\_\_\_  
President of the \_\_\_\_\_ Company.

ATTEST:

[SEAL OF COMPANY.]

\_\_\_\_\_  
Secretary.

\* The last sentence to be omitted from applications for wagon-road right of way.

## FORM 5.

STATE OF \_\_\_\_\_,  
County of \_\_\_\_\_, ss:

\_\_\_\_\_, being duly sworn, says that he is the chief engineer of (or was employed to construct the railroad, tramway, or wagon road of) the \_\_\_\_\_ company; that said (railroad, tramway, or wagon road) has been constructed under his supervision, as follows: (describe as in paragraph 12) a total length of \_\_\_\_\_ miles; that construction was commenced on the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, and completed on the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_; that the constructed (railroad, tramway, or wagon road) conforms to the map and field notes which received the approval of the Secretary of the Interior on the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_.

\_\_\_\_\_  
\_\_\_\_\_

Sworn and subscribed to before me this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_.

[SEAL.]

\_\_\_\_\_  
\_\_\_\_\_  
Notary Public.

## FORM 6.

I, \_\_\_\_\_, do hereby certify that I am the president of the \_\_\_\_\_ company; that the (railroad, tramway, or wagon road) described as follows: (describe as in Form 5) was actually constructed as set forth in the accompanying affidavit of \_\_\_\_\_, chief engineer (or the person employed by the company in the premises); that the location of the constructed (railroad, tramway, or wagon road) conforms to the map and field notes approved by the Secretary of the Interior on the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_; and that the company has in all things complied with the requirements of sections 2 to 9, inclusive, of the act of Congress approved May 14, 1898, entitled "An act extending the homestead laws and providing for right of way for railroads in the District of Alaska, and for other purposes."

\_\_\_\_\_  
\_\_\_\_\_  
President of the \_\_\_\_\_ Company.

Attest:

[SEAL OF COMPANY.]

\_\_\_\_\_  
\_\_\_\_\_  
Secretary.

## FORM 7.

STATE OF \_\_\_\_\_,  
County of \_\_\_\_\_, ss:

\_\_\_\_\_, being duly sworn, says he is the chief engineer of (or is the person employed to make the survey by) the \_\_\_\_\_ company; that the survey of the tract described as follows: (here describe as required by paragraph 12) an area of \_\_\_\_\_ acres, and no more, was made by him (or under his direction) as chief engineer of the company (or as surveyor employed by the company), and under its authority, commencing on the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, and ending on the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_; that the survey of the said tract is accurately represented on this plat and by the accompanying field notes; <sup>b</sup>(that the company has occupied no other grounds for similar purposes upon public lands within the section of [5 or 10] miles, from the \_\_\_\_\_ mile to the \_\_\_\_\_ mile, for which this selection is made); that, in his belief, the said grounds are actually and to their entire extent required by the company for the necessary uses contemplated by the act of Congress approved May 14, 1898, entitled "An act extending the homestead laws and providing for right of way for railroads in the District of Alaska, and for other purposes"; that the said tract does not lie within 4 rods of the shore of any navigable waters except as shown on this map, and that to the best of my knowledge and belief there is no settlement or other claim along the shore of any navigable waters upon land within 80 rods of any point of this tract except as shown on this map.

\_\_\_\_\_  
\_\_\_\_\_

Subscribed and sworn to before me this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_.

[SEAL.]

\_\_\_\_\_  
\_\_\_\_\_  
Notary Public.

<sup>b</sup> This clause is to be omitted in applications for terminal or junction grounds.

## FORM 8.

I, \_\_\_\_\_, do hereby certify that I am president of the \_\_\_\_\_ company; that \_\_\_\_\_, who subscribed the accompanying affidavit, is the chief engineer of (or was employed to make the survey by) the said company; that the survey of the tract described as follows: (here describe as in Form 7) an area of \_\_\_\_\_ acres, and no more, was made by him as chief engineer of (or as surveyor employed to make the survey by) the said company; that the said survey, as accurately represented on this map and by the accompanying field notes, was made under authority of the company; that the said survey, as represented on this map and by said field notes, was adopted by resolution of its board on the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, as the definite location of said tract for (station, terminal, or junction grounds);<sup>c</sup> (that the company has occupied no other grounds for similar purposes upon public lands within the section of [5 or 10] miles, from the \_\_\_\_\_ mile to the \_\_\_\_\_ mile, for which this selection is made); that, in his belief, the said grounds are actually and to their entire extent required by the company for the necessary uses contemplated by the act of Congress approved May 14, 1898, entitled "An act extending the homestead laws and providing for right of way for railroads in the District of Alaska, and for other purposes"; that the said tract does not lie within 4 rods of the shore of any navigable waters except as shown on this map; and that, to the best of my knowledge and belief, there is no settlement or other claim along the shore of any navigable waters upon land within 80 rods of any point of this tract except as shown on this map.

Attest:

[SEAL OF COMPANY.]

\_\_\_\_\_  
President of the \_\_\_\_\_ Company.\_\_\_\_\_  
Secretary.**RIGHTS OF WAY FOR RESERVOIRS, CANALS, POWER PLANTS, ETC.**

On the general applicability of right-of-way laws in the Territory, the Attorney General, responding to an inquiry whether it would be lawful to grant revocable licenses under the act of February 15, 1901 (31 Stat. 790), or easements under the act of March 4, 1911 (36 Stat. 1253), held, after a full review of all the statutes and departmental decisions thereon, and especially of the act of August 24, 1912 (37 Stat. 512), providing for the full organization of the Territory and the extension of all the laws of the United States to the Territory not locally inapplicable, that such action was authorized, for the reason that said acts of Congress were now applicable to the public lands in Alaska.

By analogy it would appear that the provisions of sections 18 to 21, inclusive, of the act of March 3, 1891 (26 Stat. 1095), as amended by section 2 of the act of May 11, 1898 (30 Stat. 404), allowing rights of way to canal and ditch companies formed for purposes of irrigation, are also applicable to public lands in Alaska, and it has been so held since said opinion.

Section 4 of the act of February 1, 1905 (33 Stat. 628), granting rights of way for dams, reservoirs, water plants, ditches, flumes, pipes, tunnels, and canals within and across the forest reserves of the United States, applies to and is operative in forest reserves in the Territory.

It is to be noted, however, that the act of June 10, 1920 (41 Stat. 1063), known as the Federal water power act, as amended by the act of March 3, 1921 (41 Stat. 1353), has superseded and repealed all acts or parts of acts inconsistent therewith, providing for the de-

<sup>c</sup> This clause is to be omitted in applications for terminal or junction grounds.

velopment and transmission of water power on the public domain and certain reservations of the United States, and that this act is applicable to Alaska. Applications thereunder should be filed with the Federal Power Commission, Washington, D. C. But electrical projects that are in no way connected with water power—for instance, those where the electrical power is generated by steam—remain under the jurisdiction of this department, pursuant to the provisions of the act of February 15, 1901 (31 Stat. 790), and that of March 4, 1911 (36 Stat. 1253), where the land involved is not within a national forest.

The general instructions and regulations regarding various rights of way above referred to are found in departmental circulars relating to such rights in the United States.

### **SPECIAL RESERVATIONS.**

#### **1. RESERVED SPACES ALONG NAVIGABLE WATERS.**

In the act of March 3, 1903 (32 Stat. 1028), amending section 1, act of May 14, 1898 (30 Stat. 409), it is provided:

That no entry shall be allowed extending more than one hundred and sixty rods along the shore of any navigable water, and along such shore a space of at least eighty rods shall be reserved from entry between all such claims.

The reservation of spaces between claims along the shore of navigable waters, thus directed, is limited in operation to forms of entry for disposition made under said acts, to wit: Homestead entries, soldiers' additional entries, and entries for trade and business.

In administering said acts, in accordance with the instructions herein, contained, no surveys will be approved, and no application, selection, filing, or location as above set out will be allowed for such reserved areas, or to exceed the 160-rod restriction along the shore line as provided in the acts aforesaid unless and until such 160-rod restriction has been waived or such 80-rod reservation restored to entry by the Secretary of the Interior in accordance with the provisions of the act of June 5, 1920 (41 Stat. 1059).

To make effective the limitations of claims along the shore line and the reservation of 80 rods between all such claims, it is directed that where any claim is so located as to approach within 80 rods of the actual shore line, such claim will be considered as located on the shore for that purpose. Such constructive extension to the shore line of claims so located shall not work a reservation of the land in front of such claims and between them and the shore line, but such lands shall be open and subject to appropriation under and in accordance with any appropriate law, and between all such claims, or the constructive extension thereof, the reserve strip shall extend for a distance of 80 rods from the shore line.

The term "navigable waters" is defined by the act of May 14, 1898, *supra*—

\* \* \* to include all tidal waters up to the line of ordinary high tide and all nontidal waters navigable in fact up to the line of high-water mark.

This definition, however, is not taken as intending to include all nontidal waters that are in fact navigable, irrespective of their extent or suitability for transportation purposes, travel, etc., and such

factors will be considered in passing upon the question of the navigability of nontidal waters.

The limitation as to the 80-rod reserve strip along the shore line is, however, extended by the act of March 3, 1903, *supra*, to "along any navigable or *other waters*." It becomes necessary therefore to define what is included in the expression "*other waters*," and it is held that the phrase includes all waters of sufficient magnitude to require meandering under the manual of surveys, or which are used as a passageway or for spawning purposes by salmon or other sea-going fish.

In consideration of applications to enter lands shown upon plats of public surveys in Alaska, abutting upon navigable waters, the restriction of 160 rods along the shore of such waters, provided by the act of May 14, 1898 (30 Stat. 409), as amended by the act of March 3, 1903 (32 Stat. 1028), to which entries are limited, shall be determined as follows: The length of the water front of a subdivision will be considered as represented by the shortest distance between the two side lines of the subdivision, measured from the shore corner nearest the back line of the tract; and the sum of the distances of each subdivision of the application abutting on the waters, so determined, shall be considered as the total shore length of the application. Where, as so measured, the excess of shore length over 160 rods is greater than the deficiency would be if an end tract or tracts were eliminated, such tract or tracts shall be excluded, otherwise the application may be allowed if in other respects proper.

Circular No. 247, approved July 7, 1913 (42 L. D. 213), is superseded hereby.

## 2. MEDICINAL SPRINGS RESERVE.

By Executive order of March 28, 1911, the following order of withdrawal was issued:

It is hereby ordered that the following lands be and the same are hereby withdrawn from settlement, location, sale, or entry and reserved for public purposes, to wit, to enable Congress to consider legislation providing for the use of medicinal springs in the public lands in the District of Alaska, subject to all the provisions, limitations, exceptions, and conditions contained in the act of Congress entitled "An act to authorize the President of the United States to make withdrawals of public lands in certain cases," approved June 25, 1910.

All tracts of public lands in the District of Alaska upon which hot springs or other springs the waters of which possess curative properties are located to the extent of 160 acres surrounding each spring in rectangular form, with side and end lines equidistant, as near as may be, from such spring or group of springs.

This order of withdrawal was modified January 24, 1914, by Executive order, as follows:

Under authority of the act of Congress entitled "An act to authorize the President of the United States to make withdrawals of public lands in certain cases," approved June 25, 1910 (36 Stat. 847), as amended by the act of August 24, 1912 (37 Stat. 497), it is hereby ordered that the Executive order dated March 28, 1911, withdrawing "all tracts of public lands in the District of Alaska upon which hot springs or other springs the waters of which possess curative medicinal properties are located to the extent of 160 acres surrounding each spring in rectangular form, with side and end lines equidistant, as near as may be, from such spring or group of springs," be revoked, so far as it applies to lands within national forests.

### 3. RIGHT OF WAY RESERVED FOR RAILROADS, TELEGRAPH AND TELEPHONE LINES.

In the act of March 12, 1914 (38 Stat. 305), authorizing the President to locate, construct, and operate railroads in the Territory it was provided:

In all patents for lands hereafter taken up, entered, or located in the Territory of Alaska there shall be expressed that there is reserved to the United States a right of way for the construction of railroads, telegraph and telephone lines to the extent of one hundred feet on either side of the center line of any such road and twenty-five feet on either side of the center line of any such telegraph or telephone lines.

### 4. ROADWAY ALONG SHORE LINE.

A provision is made in section 10 of the act of May 14, 1898 (30 Stat. 409), that—

A roadway 60 feet in width, parallel to the shore line as near as may be practicable, shall be reserved for the use of the public as a highway.

The phrase "shore line" as thus used means high-water line.

This reservation occurs in the proviso relating to the reservation between claims abutting on navigable waters; but since it is its purpose to reserve a roadway for public use as a highway along the shore line of navigable waters, it is held to relate to the lands entered or purchased under this act as well as to the reserved lands; otherwise it would serve little or no purpose. This reservation will not, however, prevent the location and survey of a claim up to the shore line, for in such case the claim will be subject to this servitude and the area in the highway will be computed as a part of the area entered and purchased.

### LANDING AND WHARF PERMITS ON RESERVED SHORE SPACES.

Section 10 of the act of May 14, 1898 (30 Stat. 409), reads in part as follows:

That there shall be reserved by the United States a space of 80 rods in width between tracts sold or entered under the provisions of this act on lands abutting on any navigable stream, inlet, gulf, bay, or seashore, and that the Secretary of the Interior may grant the use of such reserved lands abutting on the water front to any citizen or association of citizens, or to any corporation incorporated under the laws of the United States or under the laws of any State or Territory, for landings and wharves, with the provision that the public shall have access to and proper use of such wharves and landings, at reasonable rates of toll, to be prescribed by said Secretary, and a roadway 60 feet in width, parallel to the shore line as near as may be practicable, shall be reserved for the use of the public as a highway.

(1) Applications for landing and wharf privileges must be under oath, and should be addressed to the Secretary of the Interior and filed in the proper local land office for transmission to the General Land Office by special letter.

(2) Applications should describe the tracts desired by words and by a preliminary diagram showing their position in connection with adjoining surveys and water front and by courses and distances where not defined by prior surveys. There should be filed diagrams and specifications of the proposed wharves and landings, showing their position in connection with the roadway used by vessels, the width of the channel, and the various soundings. Maps and such other papers

as may be necessary to fully show the situation must be furnished. All buildings proposed to be erected should be shown on the diagram accompanying the application, and there should be indicated their use and whether they are for public or private purposes.

In an application by an individual or association, the citizenship of the individual and of the members of the association must be shown.

In case of a corporation, a certified copy of the articles of incorporation, and evidence of organization must be furnished in the same manner as is required where corporations apply for rights of way for railroad purposes.

(3) The use of such land is limited to landings and wharves, and all rates of toll to be paid by the public must be submitted for approval of the Secretary of the Interior. The application should be accompanied by a proposed schedule of public toll charges, and if such charges are found to be reasonable the schedule will be approved, subject, however, to revision as the public interests may thereafter require.

(4) If the application be allowed, the supervisor of surveys will instruct a United States surveyor to execute a survey and set permanent monuments to delineate the boundaries of the tract, and a permit will be issued granting the applicant the use of the land sought for landings and wharves, subject to the provisions and conditions prescribed by the statute, which permit will be revocable at the discretion of the Secretary of the Interior. The erection of wharves and piers in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside of established harbor lines, or where no harbor lines have been established, must be in conformity with plans recommended by the Chief of Engineers and authorized by the Secretary of War; consequently such applications will be submitted to the War Department for approval, or such other action as that department may deem proper, before final action is taken in this department.

(5) Reserved spaces between claims upon navigable waters within existing national forests in Alaska are subject to the jurisdiction of the Secretary of Agriculture, pursuant to the act of February 1, 1905 (33 Stat. 628), and permits for the use of such spaces for landings and wharves must be obtained through that department.

### CONTESTS.

Contests against entries of public lands in the Territory of Alaska may be initiated by private persons, or on the part of the Government, in the same manner as such proceedings are begun elsewhere in the United States.

The procedure in such cases will be governed by the Rules of Practice, copies of which may be obtained on application to the Commissioner of the General Land Office. The last revision of the Rules of Practice will be found in volume 48 of Land Decisions, beginning page 246.

Paragraph 4 of the instructions of May 21, 1908 (36 L. D. 433), relating to contests against homestead locations, provides as follows:

Homestead locations of lands in the District (Territory) of Alaska may be contested and canceled upon any ground which would warrant the cancellation

of a homestead entry of land elsewhere, made under section 2289, R. S.; and contests of this character may be initiated at the proper United States land office by either the Government or any private person, and should be proceeded with in the same manner and given the same effect as contests against homestead entries elsewhere.

Where a final decision has been rendered in a contest proceeding canceling a homestead location, the register will secure the notation of such judgment on the record of the location in the recording office.

### ALASKAN RAILROAD TOWN-SITE REGULATIONS.

Under and pursuant to the provisions of the act of Congress approved March 12, 1914 (38 Stat. 305), entitled "An act to authorize the President of the United States to locate, construct, and operate railroads in the Territory of Alaska, and for other purposes," it is hereby ordered that the administration of that portion of said act relating to the withdrawal, location, and disposition of town sites shall be in accordance with the following regulations and provisions, to wit:

#### REGULATIONS.

##### RESERVATIONS.

The Alaskan Engineering Commission will file with the Secretary of the Interior, when deemed necessary, its recommendations for the reservation of such areas as in its opinion may be needed for town-site purposes. The Secretary of the Interior will thereupon transmit such recommendations to the President with his objections thereto or concurrence therewith. If approved by the President, the reservation will be made by Executive order.

##### SURVEY.

When in the opinion of the Secretary of the Interior the public interests require a survey of any such reservation, he shall cause to be set aside such portions thereof for railroad purposes as may be selected by the Alaskan Engineering Commission, and cause the remainder, or any part thereof, to be surveyed into urban or suburban blocks and lots of suitable size, and into reservations for parks, schools, and other public purposes and for Government use. Highways should be laid out, where practicable, along all shore lines, and sufficient land for docks and wharf purposes along such shore lines should be reserved in such places as there is any apparent necessity therefor. The survey will be made under the supervision of the Commissioner of the General Land Office, and the plats will be approved by him and by the chairman of the Alaskan Engineering Commission.

##### PREFERENCE RIGHT.

Any person residing in a reserved town site at the time of the subdivisional survey thereof in the field and owning and having valuable and permanent improvements thereon, may, in the discretion of the Secretary of the Interior, be granted a preference right of entry, of not exceeding two lots on which he may have such im-

*See Solicitor's Opinion, Dec 26, 1928*

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improvements by paying the appraised price fixed by the superintendent of sale, under such regulations as the Secretary of the Interior may prescribe. Preference right proof and entry, when granted, must be made prior to the date of the public sale.

#### PUBLIC SALE.

The unreserved and unsold lots will be offered at public outcry to the highest bidder at such time and place, and after such publication of notice, if any, as the Secretary of the Interior may direct, and he may appoint or detail some suitable person as superintendent of sale to supervise the same and may fix his compensation and require him to give sufficient bond.

#### SUPERINTENDENT'S AUTHORITY.

Under the supervision of the Secretary of the Interior, the superintendent of the sale will be, and he is hereby, authorized to make all appraisements of lots and at any time to reappraise any lot which in his judgment is not appraised at the proper amount, or to fix a minimum price for any lot below which it may not be sold, and he may adjourn, or postpone the sale of any lots to such time and place as he may deem proper.

#### MANNER AND TERMS OF PUBLIC SALE.

The Secretary of the Interior shall by regulations prescribe the manner of conducting the public sale, the terms thereof and forms therefor and he may prescribe what failures in payment will subject the bidder or purchaser to a forfeiture of his bid or right to the lot claimed and money paid thereon. The superintendent of sale will at the completion of the public sale deposit with the receiver of the proper local land office the money received and file with its officers the papers deposited with him by said bidder, together with his certificate as to successful bidder.

If it be deemed advisable, the Commissioner of the General Land Office may direct the receiver of public moneys of the proper district to attend sales herein provided for in which event the cash payment required shall be paid to the said receiver.

#### ANCHORAGE, MATANUSKA, AND NENANA TOWN SITES.

Unsold and forfeited lands in the town sites of Anchorage, Matanuska, and Nenana, upon which assessments for the improvements of streets, sidewalks, alleys, and for promotion of sanitation and fire protection have been levied by the Alaskan Engineering Commission and the assessments or any portion thereof remain unpaid shall be subject to such unpaid assessments and the purchaser shall pay the same in the manner the Secretary of the Interior may by regulations provide, and the proceeds of such assessments will be deposited with the Alaskan Engineering Commission as a reimbursement to the operating expense fund as provided in section 3 of the act of March 12, 1914 (38 Stat. 305). (See 22 Comp. Dec. 604.) Hereafter no such assessments by the said commission will be levied. (Amended by Executive order No. 3529, printed below.)

In cases where one of a number of joint purchasers of a lot has made or may hereafter make all payments of his pro rata share of the purchase price and assessments on the lot, such lot may, in the event of forfeiture being declared, and in the discretion of the Secretary of the Interior, be resubdivided and a preference right of purchase given to the person who has made all payments on his portion thereof, such preference right to be confined to the portion of the original lot held and claimed by such person. This privilege may be extended to a transferee of an original purchase.

Final certificate may issue in these town sites in all cases when the purchase price and assessments are paid in full without regard to date or purchase.

(6)

#### COMMISSION BUILDINGS ON LOTS.

Buildings belonging to the Alaskan Engineering Commission situated on a lot in any town site may be appraised and sold separate and apart from the lot on which located, under regulations provided for by the Secretary of the Interior for the same and for the removal of the buildings. The proceeds for the sale of such buildings shall be paid to the Alaskan Engineering Commission as a reimbursement to its operating account.

#### PRIVATE ENTRY.

Lots offered at public sale and not sold and lots offered and declared forfeited in a town site may, in the discretion of the Secretary of the Interior, be sold at private entry for the appraised price.

#### ORDERS REVOKED.

(No. 3489.)

All Executive orders heretofore issued for the disposition of town sites along the Government railroads in Alaska are hereby revoked so far as they conflict with the foregoing provisions. This order is intended to take the place of all other orders making provision for the sale and disposal of lots in said town sites along Government railroads in Alaska under the provisions of said act.

WARREN G. HARDING.

THE WHITE HOUSE,  
June 10, 1921.

(No. 3529)

Under and pursuant to the provisions of the act of Congress approved March 12, 1914 (38 Stat. 305), it is ordered that Executive order No. 3489, issued June 10, 1921, be, and the same is hereby, amended to authorize and empower the Alaskan Engineering Commission to levy and collect assessments for town-site expenses for the town site of Nenana, for the improvements of streets, sidewalks, alleys, and for promotion of sanitation and fire protection, for the period from July 1, 1920, to August 31, 1921.

WARREN G. HARDING.

THE WHITE HOUSE,  
August 9, 1921.

Serial No. \_\_\_\_\_  
 Receipt No. \_\_\_\_\_

*Application to purchase town lot.*

[To be executed in duplicate.]

DEPARTMENT OF THE INTERIOR.

UNITED STATES LAND OFFICE.

\_\_\_\_\_, Alaska.

I, \_\_\_\_\_, post-office address \_\_\_\_\_, having been declared the successful bidder for Lot No. \_\_\_\_\_, Block No. \_\_\_\_\_, in the town site of \_\_\_\_\_, Alaska, as delineated and designated on the approved plat thereof, containing \_\_\_\_\_ square feet, do hereby apply to purchase said lot, subject to all the regulations governing the sale thereof, and agree to pay therefor the amount bid by me, viz: \_\_\_\_\_ dollars (\$\_\_\_\_\_), on the following terms, to wit: One-third cash, which is tendered herewith, and the balance in five equal annual installments; payable in one, two, three, four, and five years, respectively, from the date register's certificate of sale issues hereunder; upon failure to pay any installment on or before the day the same becomes due, all rights under this application, together with the payments theretofore made, may be forfeited by the Secretary of the Interior.

I further agree that if the said lot, or any part thereof, shall be used for the purpose of manufacturing, selling, or otherwise disposing of intoxicating liquors as a beverage, or for gambling, prostitution, or any unlawful purpose, at any time during a period of five years from the date of register's certificate of sale, and prior to the issuance of certificate of final entry, or if, at any time during said period, I, or my successors in interest under this application, shall fail to comply with any regulation or requirement which the Secretary of the Interior, in his discretion, shall make or authorize to be made, for the improvement of streets, sidewalks, and alleys, promotion of sanitation, and fire protection within said town site, then all rights under this application shall terminate and a forfeiture thereof, together with the payments theretofore made, may be declared by the Secretary of the Interior, whose finding of fact shall be final.

(Sign here, full Christian name.)

I hereby certify that the foregoing application and agreement was signed and acknowledged before me this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, at \_\_\_\_\_.

(Official designation of officer.)

(NOTE.—No sum less than twenty-five dollars (\$25.00) will be received as the first cash payment, and if one-third the amount bid is less than that sum, proper modification should be made in the above terms of sale relating to payment.)

*Certificate as to successful bidder.*

\_\_\_\_\_, Alaska,  
 \_\_\_\_\_, 19\_\_\_\_.

This is to certify that \_\_\_\_\_, post-office address \_\_\_\_\_, \_\_\_\_\_, has been declared the successful bidder for Lot No. \_\_\_\_\_, Block No. \_\_\_\_\_, in the town site of \_\_\_\_\_, Alaska, and is entitled to purchase said lot. The amount of his bid was \_\_\_\_\_ dollars (\$\_\_\_\_\_), on which there has been paid to the undersigned to apply as cash payment the sum of \_\_\_\_\_ dollars (\$\_\_\_\_\_).

\_\_\_\_\_  
 Superintendent of Sale.

*Register's certificate of sale.*

U. S. Land Office, \_\_\_\_\_, Alaska,  
\_\_\_\_\_, 19\_\_\_\_.

I hereby certify that the foregoing application has this day been allowed subject to the terms, conditions, and agreements therein set forth.

\_\_\_\_\_  
*Register.*

(NOTE.—After application has been allowed, the duplicate copy thereof should be transmitted to the applicant.)

*Memorandum certificate to successful bidder.*

\_\_\_\_\_, Alaska,  
\_\_\_\_\_, 19\_\_\_\_.

This is to certify that \_\_\_\_\_, post-office address \_\_\_\_\_, has been declared the successful bidder for Lot No. \_\_\_\_\_, Block No. \_\_\_\_\_, in the town site of \_\_\_\_\_, Alaska, and is entitled to purchase said lot. The amount of his bid was \_\_\_\_\_ dollars (\$\_\_\_\_\_).

\_\_\_\_\_  
*Superintendent of Sale.*

NOTE TO BIDDER.—This memorandum certificate must be surrendered to the superintendent of sale before the close of the next succeeding sale day, or the next business day if bid accepted on the last sale day, together with application to purchase the lot described, accompanied by the cash payment required by the regulations governing the sale, or all rights under the bid will be forfeited.

## **FORFEITURE OF LOTS UNDER ALASKAN RAILROAD TOWN-SITE REGULATIONS—PROCEDURE.**

INSTRUCTIONS OF FEBRUARY 16, 1916.

The following procedure for the forfeiture of lots under the Alaskan Railroad town-site regulations, Executive order approved June 19, 1915, is adopted, to become effective immediately:

1. The purpose hereof is to secure prompt action in cases where there has been any alleged violation of said regulations, or failure to comply with the terms thereof, or of any and all regulations or requirements which the Secretary of the Interior may make, or authorize to be made, pursuant to said Executive order, and to allow the lot purchaser or other party in interest an opportunity to file a denial of the charges against his claim and be heard thereon.

2. Whenever the Chief of the Alaskan Field Division is of the opinion that proceedings to forfeit any lot are warranted, he will prepare a notice of charges, which will be made over his signature as Chief of Field Division, but not under oath or corroborated, in which shall be plainly and briefly stated the grounds upon which the charges are based.

3. The notice must be written or printed and must contain the number of the lot and block and the name of the purchaser or other known party in interest, and shall be prepared in quadruplicate; the original shall be served as hereinafter directed; one copy shall be forwarded to the register and receiver, who will note the same upon their records and forward it to the Commissioner of the General Land Office, who will promptly cause proper notation to be made upon his records, and no patent or other evidence of title shall issue until and unless the case is closed in favor of the claimant; the third

copy shall be retained by the Chief of Field Division for his records, and the fourth copy to be forwarded to the Land and Industrial Department of the Alaskan Engineering Commission.

4. The notice must also state that the charges will be taken as confessed (*a*) unless the purchaser or claimant files with the Chief of Field Division, within 20 days from the receipt of notice, a written denial, under oath, of said charges, with an application for a hearing, (*b*) or if he fails to appear at any hearing that may be ordered in the case.

5. The original notice of the charges may in all cases be served personally upon the proper party by any person over the age of 18 years, or by registered letter mailed to the last address of the party to be notified, as shown by the record, and to the post office nearest to the land. Proof of personal service shall be the written acknowledgment of the person served, or the affidavit of the person who served the notice showing personal delivery thereof to the party served and stating the time and place of such delivery. Proof of service of notice by registered mail shall consist of the affidavit of the person who mailed the notice attached to the post-office registry return receipt or the returned unclaimed registered letter. Where service of notice is made by an employee of the Government under oath of office, his certificate will be sufficient in lieu of the affidavit otherwise required.

6. If the charges are denied and a hearing asked for, the register and receiver of the proper land district, upon request of the Chief of Field Division, will fix a date and place for a preliminary hearing before any United States commissioner, notary public, judge, or clerk of a court of record, due notice of which must be given the party or parties in interest. Such notice must also designate a date for final hearing before the register and receiver, after which neither the Government nor the defendant may take any testimony except upon proper showing under the rules governing continuances, or upon written stipulation filed in the case. The notice may be served either by securing personal service upon the parties in interest or by registered mail. A copy of said notice shall be sent by ordinary mail to the Commissioner of the General Land Office.

7. The Chief of Field Division will duly submit to the Commissioner of the General Land Office, upon proper form provided therefor, an estimate of the probable expense required on behalf of the Government. He will also cause to be served subpoenas upon the Government witnesses, and take such other steps as are necessary to prepare the case for hearing.

8. The Chief of Field Division, or any special agent who may be designated by him, must appear with his witnesses on the date and at the place fixed for the hearing unless there is reason to believe that no appearance by or for the defendant will be made, in which event no appearance on behalf of the Government is required.

9. If the party or parties in interest fail to deny the charges under oath and apply for a hearing, or fail to appear at the hearing ordered without showing good cause therefor, such failure will be taken as an admission of the truth of the charges and will obviate any necessity for the Government to submit evidence in support thereof. In the event of default in denying the charges and applying for a hearing, the Chief of Field Division will forthwith report

the case to the Commissioner of the General Land Office, with his recommendation thereon, and notify the parties in interest by registered mail of the action taken; if denial is made and hearing applied for, but defendant or defendants fail to appear at the hearing and fail to show good cause for such failure to appear, the register and receiver will forthwith report the case to the commissioner, with their recommendation thereon, and notify the parties of such action by registered mail.

10. Upon the day set for the hearing and the day to which it may be continued the testimony of the witnesses for either party may be submitted, and both parties, if present, may examine and cross-examine the witnesses, under the rules, the Government to assume the burden of proving the charges.

11. After the hearing, if one is had, but not sooner than the day succeeding that named for final hearing, the register and receiver will promptly forward the record to the Commissioner of the General Land Office, with their recommendation in the matter, and will notify all parties in interest of their action by ordinary mail.

12. Depositions may be taken on behalf of either party before any officer authorized to administer oaths, after first giving 10 days' written notice to the opposite party, or they may be taken by stipulation, as provided by Rule 27 of the Rules of Practice.

13. Decision will be rendered by the Secretary of the Interior in cases governed by these regulations, and will be final and close the case. Such decision may be rendered at any time after the expiration of 30 days from the date the record in the case is received by the Commissioner of the General Land Office. Motions or briefs must be filed with the Commissioner of the General Land Office.

14. The Rules of Practice, where not in conflict herewith, will be applicable to proceedings under these regulations. Notices to which the lot purchaser is entitled will be served upon persons having an interest in the lot, provided a notice of such interest has been filed in the district land office as required by rule 98 of the Rules of Practice.

15. The Alaskan Engineering Commission will make all needful rules and regulations covering the period prescribed by the town-site regulations for the improvement of streets, sidewalks, and alleys, the promotion of sanitation and fire protection or other municipal improvements, and said commission is further authorized to levy and collect such assessments as may be necessary in the premises. If any claimant shall fail to comply with such regulations and requirements, all the facts in each case shall be reported to the chief of field division, who will then proceed in accordance with the instructions contained hereinbefore. If any claimant shall fail to pay any and all assessments as required by the Alaskan Engineering Commission, the case will be reported to the Commissioner of the General Land Office, with a complete statement of the proceedings had, for submission to the Secretary of the Interior, who, after such notice as he may deem proper, will declare a forfeiture of the lot involved or make such other disposition of the case as the record may warrant.

Notice of delinquency in the payment of assessments will be given by the Alaskan Engineering Commission to the register and receiver of the United States land office within whose jurisdiction the lot or tract involved is situated for notation upon their records and trans-

mission to the Commissioner of the General Land Office, and such notice will operate as a caveat against the issuance of patent or other evidence of title until the same is finally disposed of.

### MINING CLAIMS.

Instructions only relative to acts of Congress specially applicable to Alaska are included herein; for instructions under the general mining laws consult Circular No. 430, "United States Mining Laws and Regulations Thereunder," which may be had on application to a district land office or the General Land Office, Washington, D. C.

The laws of the United States relating to mining claims were extended to Alaska by section 8, act of May 17, 1884 (23 Stat. 24), providing a civil government for Alaska, in the following terms:

SEC. 8. That the said District of Alaska is hereby created a land district, and a United States land office for said district is hereby located at Sitka. The commissioner provided for by this act to reside at Sitka shall be ex officio register of said land office, and the clerk provided for by this act shall be ex officio receiver of public moneys, and the marshal provided for by this act shall be ex officio surveyor general of said district and the laws of the United States relating to mining claims, and the rights incident thereto, shall, from and after the passage of this act, be in full force and effect in said district, under the administration thereof herein provided for, subject to such regulations as may be made by the Secretary of the Interior, approved by the President: *Provided*, That the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them, but the terms under which such persons may acquire title to such lands are reserved for future legislation by Congress: *And provided further*, That parties who have located mines or mineral privileges therein under the laws of the United States applicable to the public domain, or who have occupied and improved or exercised acts of ownership over such claims, shall not be disturbed therein, but shall be allowed to perfect their title to such claims by payment as aforesaid: *And provided also*, That the land not exceeding six hundred and forty acres at any station now occupied as missionary stations among the Indian tribes in said section, with the improvements thereon erected by or for such societies, shall be continued in the occupancy of the several religious societies to which said missionary stations respectively belong until action by Congress. But nothing contained in this act shall be construed to put in force in said district the general land laws of the United States.

Sections 15, 16, and 26 in the act of June 6, 1900 (31 Stat. 321), making further provision for a civil government for Alaska, again, in specific terms, extended the mining laws of the United States, and all rights incident thereto to the Territory, with certain further provisions with respect to the acquisition of claims thereunder:

SEC. 15. The respective recorders shall, upon the payment of the fees for the same prescribed by the Attorney General, record separately, in large and well-bound separate books, in fair hand:

First. Deeds, grants, transfers, contracts to sell or convey real estate and mortgages of real estate, releases of mortgages, powers of attorney, leases which have been acknowledged or proved, mortgages upon personal property;

\* \* \* \* \*

Ninth. Affidavits of annual work done on mining claims;

Tenth. Notices of mining location and declaratory statements;

Eleventh. Such other writings as are required or permitted by law to be recorded, including the liens of mechanics, laborers, and others: *Provided*, Notices of location of mining claims shall be filed for record within ninety days from the date of the discovery of the claim described in the notice, and all instruments shall be recorded in the recording district in which the property or subject matter affected by the instrument is situated, and where the prop-

erty or subject matter is not situated in any established recording district the instrument affecting the same shall be recorded in the office of the clerk of the division of the court having supervision over the recording division in which such property or subject matter is situated.

SEC. 16. *Provided*, Miners in any organized mining district may make rules and regulations governing the recording of notices of location of mining claims, water rights, flumes and ditches, mill sites, and affidavits of labor, not in conflict with this act or the general laws of the United States; and nothing in this act shall be construed so as to prevent the miners in any regularly organized mining district not within any recording district established by the court from electing their own mining recorder to act as such until a recorder therefor is appointed by the court: *Provided further*, All records heretofore regularly made by the United States commissioner at Dyea, Skagway, and the recorder at Douglas City, not in conflict with any records regularly made with the United States commissioner at Juneau, are hereby legalized. And all records heretofore made in good faith in any regularly organized mining district are hereby made public records, and the same shall be delivered to the recorder for the recording district including such mining district within six months from the passage of this act.

SEC. 26. The laws of the United States relating to mining claims, mineral locations, and rights incident thereto are hereby extended to the District of Alaska: *Provided*, That subject only to such general limitations as may be necessary to exempt navigation from artificial obstructions all land and shoal water between low and mean high tide on the shores, bays, and inlets of Bering Sea, within the jurisdiction of the United States, shall be subject to exploration and mining for gold and other precious metals by citizens of the United States, or persons who have legally declared their intentions to become such, under such reasonable rules and regulations as the miners in organized mining districts may have heretofore made or may hereafter make governing the temporary possession thereof for exploration and mining purposes until otherwise provided by law: *Provided further*, That the rules and regulations established by the miners shall not be in conflict with the mining laws of the United States; and no exclusive permit shall be granted by the Secretary of War authorizing any person or persons, corporation or company to excavate or mine under any of said waters below low tide, and if such exclusive permit has been granted it is hereby revoked and declared null and void; but citizens of the United States or persons who have legally declared their intention to become such shall have the right to dredge and mine for gold or other precious metals in said waters, below low tide, subject to such general rules and regulations as the Secretary of War may prescribe for the preservation of order and the protection of the interests of commerce; such rules and regulations shall not, however, deprive miners on the beach of the right hereby given to dump tailings into or pump from the sea opposite their claims, except where such dumping would actually obstruct navigation, and the reservation of a roadway sixty feet wide, under the tenth section of the act of May fourteenth, eighteen hundred and ninety-eight, entitled "An act extending the homestead laws and providing for right of way for railroads in the District of Alaska, and for other purposes," shall not apply to mineral lands or town sites.

#### PLACER CLAIMS.

The act of August 1, 1912 (37 Stat. 242), modifies and amends the placer-mining law with respect to the location of such claims in the Territory as follows:

That no association placer-mining claim shall hereafter be located in Alaska in excess of forty acres, and on every placer-mining claim hereafter located in Alaska, and until a patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year, including the year of location, for each and every twenty acres or excess fraction thereof.

SEC. 2. That no person shall hereafter locate any placer-mining claim in Alaska as attorney for another unless he is duly authorized thereto by a power

of attorney in writing, duly acknowledged and recorded in any recorder's office in the judicial division where the location is made. Any person so authorized may locate placer-mining claims for not more than two individuals or one association under such power of attorney, but no such agent or attorney shall be authorized or permitted to locate more than two placer-mining claims for any one principal or association during any calendar month, and no placer-mining claim shall hereafter be located in Alaska except under the limitations of this act.

SEC. 3. That no person shall hereafter locate, cause or procure to be located, for himself more than two placer-mining claims in any calendar month: *Provided*, That one or both of such locations may be included in an association claim.

SEC. 4. That no placer-mining claim hereafter located in Alaska shall be patented which shall contain a greater area than is fixed by law, nor which is longer than three times its greatest width.

SEC. 5. That any placer-mining claim attempted to be located in violation of this act shall be null and void, and the whole area thereof may be located by any qualified locator as if no such prior attempt had been made.

October 29, 1912, the following instructions were issued under this act (41 L. D. 347):

It is important to note that this act applies exclusively to placer-mining claims located in Alaska on or after August 1, 1912. It does not in any manner relate to lode-mining claims, or placer-mining claims located prior to said date. The terms of the act lay strict limitations and conditions with respect to the placer locations made upon or after said date.

Section 1 of the act provides that no association placer claim shall be located after August 1, 1912, in excess of 40 acres. This limitation is positive, whatever may be the number of persons associated together or whatever the local district rules or regulations may permit.

Said section further provides that on every placer-mining claim located in Alaska after the passage of the act, and until patent therefor has been issued, not less than \$100 worth of labor must be performed or improvements made during each year, including the year of location, for each and every 20 acres or excess fraction thereof included in the claim. This means that the first annual expenditure on such a placer-mining location must be accomplished for and during the year in which the claim is located, instead of during the year succeeding that in which the location is made. Moreover, the amount of annual expenditure is dependent upon the size of the claim, it being required that at least \$100 must be expended for each 20 acres or excess fraction thereof embraced in the location.

By section 2 it is provided that no person, as attorney or agent for another, may locate any placer-mining claim unless duly authorized by a power of attorney properly acknowledged and recorded in some recorder's office within the judicial division where the location is made. Furthermore, an authorized agent or attorney can act in making locations of placer-mining claims for only two individual principals or one associate principal during any calendar month, and during that period may not lawfully locate more than two claims for any one principal, either individual or association. No placer claim can lawfully be located except in compliance with and under the limitations of the act.

In order that the Land Department may be fully advised in the premises, the following requirements must be met with regard to applications for placer-mining claims located in Alaska on or after August 1, 1912:

(a) Where location is made by agent or attorney the power of attorney must be in writing and must be executed and acknowledged in accordance with the laws of the Territory of Alaska or of the State, Territory, or District in which it shall be executed. It must be recorded in the proper recorder's office as prescribed by the act. The application for patent must be accompanied by a certified copy of such power of attorney, which must show the recordination thereof, but it will be sufficient if such certified copy is attached to and made a part of the abstract of title.

(b) One of the principal purposes of the act is to limit the number of placer-mining locations made in Alaska through agents or attorneys. An agent or attorney can not at one time represent more than two individuals or one association under powers of attorney. A duly authorized agent may make two locations for each of two individual principals, or for one association principal,

during any calendar month, but he can make no further locations during that month for those or other principals.

The application for patent should accordingly be accompanied by the sworn statement of the agent or attorney setting forth specifically the names of all placer-mining claims, together with the date of location and names of the locators, which were located or attempted to be located by him under powers of attorney during the calendar month in which the placer claim applied for was located.

(c) By section 3 it is prescribed that no person shall directly locate, or through an agent or attorney cause or procure to be located, for himself more than two placer-mining claims in any calendar month, provided, however, that one or both of such locations may be included in an association claim.

Whenever a person or an association has participated in the locating of placer-mining claims in Alaska to the extent of two such claims in any calendar month, such person or such association thereby exhausts the right to make placer locations for that month. The application for patent, therefore, for a placer-mining claim located in Alaska on or after August 1, 1912, must contain or be accompanied by a specific statement, under oath, as to each locator who had an interest therein, showing specifically and in detail all placer locations made by him, or in which he was associated, either directly or through any agent or attorney, during the calendar month in which the claim applied for was located. If no locations in excess of those permitted by law were made during such calendar month, a specific statement, under oath, to that effect should be submitted. This showing must be made in addition to that hereinabove required of the agent himself.

Section 4 of the act prohibits the patenting of any placer mining claim located in Alaska after the passage of the act which contains a greater area than that fixed by law or which is longer than three times its greatest width. The surveyor general will be careful to observe the above requirements and will not approve any survey of a placer location which does not in area and dimensions conform to the provisions of law.

By section 5 of the act it is declared that any placer mining claim attempted to be located in violation of the provisions and limitations of the act shall be null and void and the whole area covered by such attempted location may be located by any qualified person the same as if no such prior attempted location had been made. Consequently, any attempted placer location not made in conformity with the act is a nullity, and the land covered thereby is open for and subject to proper location at any time.

It will be observed that the act does not affect the number of claims, lode or placer, and if placer whether located before or after the passage of the act, which may be included in a single application proceeding.

The law governing annual expenditures and improvements upon mining claims in Alaska is found in the act of March 2, 1907 (34 Stat. 1243), as follows:

That during each year and until patent has been issued therefor, at least one hundred dollars' worth of labor shall be performed or improvements made on, or for the benefit or development of, in accordance with existing law, each mining claim in the District of Alaska heretofore or hereafter located. And the locator or owner of such claim or some other person having knowledge of the facts may also make and file with the said recorder of the district in which the claims shall be situate an affidavit showing the performance of labor or making of improvements to the amount of one hundred dollars as aforesaid and specifying the character and extent of such work. Such affidavit shall set forth the following: First, the name or number of the mining claims and where situated; second, the number of days' work done and the character and value of the improvements placed thereon; third, the date of the performance of such labor and of making improvements; fourth, at whose instance the work was done or the improvements made; fifth, the actual amount paid for work and improvement, and by whom paid when the same was not done by the owner. Such affidavit shall be prima facie evidence of the performance of such work or making of such improvements, but if such affidavits be not filed within the time fixed by this act the burden of proof shall be upon the claimant to establish the performance of such annual work and improvements. And upon failure of the locator or owner of any such claim to comply with the provisions of this act, as to performance of work and improvements, such claim

shall become forfeited and open to location by others as if no location of the same had ever been made. The affidavits required hereby may be made before any officer authorized to administer oaths, and the provisions of sections fifty-three hundred and ninety-two and fifty-three hundred and ninety-three of the Revised Statutes are hereby extended to such affidavits. Said affidavits shall be filed not later than ninety days after the close of the year in which such work is performed.

SEC. 2. That the recorders for the several divisions or districts of Alaska shall collect the sum of one dollar and fifty cents as a fee for the filing, recording, and indexing said annual proofs of work and improvements for each claim so recorded.

#### NOTICE OF APPLICATION FOR PATENT.

The notices of applications for patent for lands in Alaska are, in many cases, not sufficient to apprise adverse claimants and the public generally of the location of the land applied for, and therefore do not serve the purpose for which such notices are required; nor can the location of the land be ascertained from the application papers themselves and without obtaining information from other sources. This is due principally to the large area of unsurveyed land in the Territory and remoteness from centers of population of much of the country. In order to give a more definite description of the land applied for special supplemental instructions with reference to the District of Alaska have been issued as follows:

The field notes of survey of all claims within the Territory of Alaska, where the survey is not tied to a corner of the public survey, shall contain a description of the location or mineral monument to which the survey is tied, by giving its latitude and longitude, and its position with reference to rivers, creeks, mountains or mountain peaks, towns, or other prominent topographical points or natural objects or monuments, giving the distances and directions as nearly accurate as possible, especially with reference to any well-known trail to a town or mining camp, or to a river or mountain appearing on the map of Alaska, which description shall appear in the field notes regardless of whether or not the survey be tied to an existing monument, or to a monument established by the surveyor when making the survey in accordance with existing regulations with reference to the establishment of such monuments. The description of such monument shall appear in a paragraph separate from the description of the courses and distances of the survey.

All notices of applications for patent for lands in the Territory of Alaska, where the survey on which the application is based is not tied to a corner of the public survey, shall, in addition to the description required to be given by existing regulations, describe the monument to which the claim is tied by giving its latitude and longitude and a reference by approximate course and distance to a town, mining camp, river, creek, mountain, mountain peak, or other natural object appearing on the map of Alaska, and any other facts shown by the field notes of survey which shall aid in determining the exact location of such claim without an examination of the record or a reference to other sources. The registers and receivers will exercise discretion in the matter of such descriptions in the published notices, bearing in mind the object to be attained, of so describing the land embraced in the claim as to enable its location to be ascertained from the notice of application.

#### PLATS OF SURVEY.

As to plats of survey of mining claims in the Territory of Alaska, the Commissioner of the General Land Office will have three photolithographic copies made upon drawing paper, two copies of which, with the original plat, will be forwarded to the surveyor general, the three plats to be filed and disposed of as follows: One plat and the original field notes to be retained in the office of the surveyor

general; one plat and a copy of the field notes to be given the claimant, for filing with the proper register, to be finally transmitted by that officer, with other papers in the case, to the General Land Office, and one plat to be sent by the surveyor general to the register of the proper land district to be retained in his files for future reference. The commissioner will mail one photolithographic copy of the plat, made upon drawing paper, direct to the applicant for survey, or to his agent or attorney, when the application is made by agent or attorney, at his record address, to be used for posting on the land.

A certain number of photolithographic copies will be furnished the surveyor general for sale at a cost of 30 cents each, and a photolithographic copy printed on tracing paper will be furnished the surveyor general, from which blue prints may be made, to be sold at cost.

#### RATES FOR NEWSPAPER PUBLICATIONS.

Section 2334 of the Revised Statutes provides for the appointment of surveyors to survey mining claims, and authorizes the Commissioner of the General Land Office to establish the rates to be charged for surveys and for newspaper publications in mining cases. Under this authority of law, the following rates have been established as the maximum charges for newspaper publications:

The charge for the publication of notice of application for patent in a mining case, in all districts, exclusive of the Fairbanks and Nome districts, Alaska, shall not exceed the legal rates allowed by the laws of the State, wherein the notice is published, for the publication of legal notices, and in no case shall the charge exceed \$7 for each 10 lines of space occupied where publication is had in a daily newspaper, and where a weekly newspaper is used as a medium of publication \$5 shall be the maximum charge for the same space. Such charge shall be accepted as full payment for publication in each issue of the newspaper for the entire period required by law.

For such publications in the Fairbanks and Nome districts the maximum rate is fixed at \$10 for each 10 lines of space in a daily newspaper for the required period, and at \$7 for the same space and time if publication be had in a weekly newspaper.

It is expected that these notices shall not be so abbreviated as to curtail the description essential to a perfect notice, and the said rates are established upon the understanding that they are to be in the usual body type used for legal notices.

#### ABSTRACT.

In the Territory of Alaska the application for patent will be received and filed and the order for publication issued if the abstract showing full title in the applicant is brought down to a day reasonably near the date of the presentation of the application. A supplemental abstract of title brought down so as to include the date of the filing of the application must be furnished prior to the expiration of the 60-day period of publication.

**SPECIAL AFFIDAVIT.**

The register and receiver will require each person applying to enter or in any manner acquire title to any of the lands in Alaska, under any law of the United States, except the homestead law, to file a corroborated affidavit, which is described on page — of this circular.

**ADVERSE CLAIMS.**

The time within which adverse claims may be filed and suit instituted thereon is extended as to such claims in the Territory by the act of June 7, 1910 (36 Stat. 459), which provides:

That in the District of Alaska adverse claims authorized and provided for in section twenty-three hundred and twenty-five and twenty-three hundred and twenty-six, United States Revised Statutes, may be filed at any time during the sixty days' period of publication or within eight months thereafter, and the adverse suits authorized and provided for in section twenty-three hundred and twenty-six, United States Revised Statutes, may be instituted at any time within sixty days after the filing of said claims in the local land office.

June 25, 1910, the following instructions were issued under this act (39 L. D. 49):

The act provides that adverse claims may be filed at any time during the 60-day period of publication or within 8 months thereafter. This provision applies to any application where the 60-day period of publication ended with or ends after June 7, 1910, and operates to enlarge by 8 months additional the time within which an adverse claim may be filed. This provision does not apply to any application under which the 60-day period of publication ended with or before June 6, 1910; for if no adverse claim was seasonably filed in such case the statutory assumption that none existed has arisen, upon the expiration of the publication period, in favor of the applicant.

It is also provided by the act that adverse suits may be instituted at any time within 60 days after the filing of adverse claims in the local land office. This provision applies to any adverse claim under which the 30-day period fixed under the former law for commencing the adverse suit was running on or expired with June 7, 1910, and enlarges such time to a period of 60 days, and also to any adverse claim which is seasonably filed on or after June 7, 1910. Such provision has no operation in a case where, under the former law, the 30-day period within which to institute suit on an adverse claim expired with or ended before June 6, 1910, and the 60-day publication period also expired on or before June 6, 1910.

Registers and receivers of United States land offices in Alaska will exercise the greatest care in applying the provisions of the act, and will allow no mineral entry until after the expiration of the full period granted for the filing of adverse claims. For example, on any application under which the publication period ended with or after June 7, 1910, no entry will in any event be allowed until after the expiration of the eight months' period following the publication period.

**OIL AND GAS LANDS.<sup>3</sup>**

By Executive order dated November 3, 1910, all the public lands and lands in national forests in the District of Alaska containing petroleum deposits were withdrawn from settlement, location, sale, or entry and reserved for classification, and in aid of legislation affecting the use and disposal of petroleum lands belonging to the United States.

The disposition of oil and gas lands and oil and gas deposits owned by the United States in Alaska is governed by the act of February 25, 1920 (41 Stat. 437), known as the mineral leasing act.

<sup>3</sup> See p. 126 for agricultural entries on oil lands.

In the administration of this act, prospecting permits and leases are issued. In Alaska there may be allowed a maximum of five permits of an area of not exceeding 2,560 acres each. "One individual, corporation, or association may locate and obtain but one permit in a geologic structure of a nonproducing field, but for development purposes assignments to a qualified individual, corporation, or association, outside producing oil or gas fields, for not exceeding five permits in Alaska, whether contiguous or noncontiguous, may be presented for the consideration of the Secretary of the Interior, and his approval, if he shall find same to be in the public interest." (48 L. D. 46.)

If it is desired to acquire a preference right to a permit, it is necessary to erect a monument and post notice on the land desired, after which the locator has for six months a preferential right to file an application. Permits, when granted, are for a period of four years.

Upon establishing that valuable oil or gas deposits have been discovered on the land, the permittee is entitled to a lease for one-fourth of the area embraced in his permit, or for as much as 160 acres if there be that number of acres in the permit, and a preference right to a lease for the remainder of the land included in the permit. The royalties on leases in Alaska are set forth in Circular No. 672, referred to below.

A distinction is made between lands which are within and which are without the known geologic structure of a producing oil or gas field. Permits, as set forth in the foregoing, are issued for the latter class of lands. Up to the present time, there are, with the exception of a small area near Katalla, no producing structures in Alaska, and with this exception, and possibly the Yakataga field, the boundaries or possible structures of fields have not been ascertained.

Instructions under the leasing act, giving fully the requirements, the procedure and references to important rulings, are contained in General Land Office Circular No. 672 (47 L. D. 437), which may be obtained from the district land offices or the General Land Office, Washington, D. C. A special circular under the act, relating to Alaska, has also been issued as General Land Office Circular No. 845 (49 L. D. 207), which may be secured in the same manner.<sup>1</sup>

#### LEASES FOR OTHER MINERALS.

The act of October 2, 1917 (40 Stat. 219) authorizes the leasing of lands containing deposits of potash, and regulations thereunder will be found in Circular No. 594 (46 L. D. 323). The mineral leasing act of February 25, 1920 (41 Stat. 437) includes phosphate, oil shale, and sodium, and instructions with respect to obtaining leases for these deposits may be found in circulars No. 696 (47 L. D. 513), No. 671 (47 L. D. 524), and No. 699 (47 L. D. 529), respectively.

#### COAL LANDS.

The statutes particularly affecting the public coal lands and coal deposits in Alaska and the procedure governing their disposition are comprised in the act of October 20, 1914 (38 Stat. 741), see page 98, the act of March 4, 1921 (41 Stat. 1363), see page 124, and the act of March 8, 1922 (41 Stat. 415), see page 126.

<sup>1</sup> Circulars Nos. 672 and 845 were amended Oct. 15, 1923, Circular No. 905 (50 L. D. 155).—Ed.

Briefly, the first of these inaugurated the coal leasing system in Alaska, the second amended the first so as to make provision for the issuance of coal prospecting permits, and the third authorized agricultural entries on coal lands.

**REGULATIONS GOVERNING COAL-LAND LEASES IN THE TERRITORY OF ALASKA, APPROVED MAY 18, 1916.<sup>1</sup>**

**COAL LAND LEASING ACT.**

The text of the act approved October 20, 1914 (38 Stat. 741), that provides for the leasing of coal lands in the Territory of Alaska is as follows:

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the Secretary of the Interior be, and hereby is, authorized and directed to survey the lands of the United States in the Territory of Alaska known to be valuable for their deposits of coal, preference to be given first in favor of surveying lands within those areas commonly known as the Bering River, Matanuska, and Nenana coal fields, and thereafter to such areas or coal fields as lie tributary to established settlements or existing or proposed rail or water transportation lines: *Provided*, That such surveys shall be executed in accordance with existing laws and rules and regulations governing the survey of public lands. There is hereby appropriated, out of any money in the Treasury not otherwise appropriated, the sum of \$100,000 for the purpose of making the surveys herein provided for, to continue available until expended: *Provided*, That any surveys heretofore made under the authority or by the approval of the Department of the Interior may be adopted and used for the purposes of this act.

SEC. 2. That the President of the United States shall designate and reserve from use, location, sale, lease, or disposition not exceeding five thousand one hundred and twenty acres of coal-bearing land in the Bering River field and not exceeding seven thousand six hundred and eighty acres of coal-bearing land in the Matanuska field, and not to exceed one-half of the other coal lands in Alaska: *Provided*, That the coal deposits in such reserved areas may be mined under the direction of the President when, in his opinion, the mining of such coal in such reserved areas, under the direction of the President, becomes necessary, by reason of an insufficient supply of coal at a reasonable price for the requirements of Government works, construction and operation of Government railroads, for the Navy, for national protection, or for relief from monopoly or oppressive conditions.

SEC. 3. That the unreserved coal lands and coal deposits shall be divided by the Secretary of the Interior into leasing blocks or tracts of forty acres each, or multiples thereof, and in such form as in the opinion of the Secretary will permit the most economical mining of the coal in such blocks, but in no case exceeding two thousand five hundred and sixty acres in any one leasing block or tract; and thereafter, the Secretary shall offer such blocks or tracts and the coal, lignite, and associated minerals therein for leasing, and may award leases thereof through advertisement, competitive bidding, or such other methods as he may by general regulations adopt, to any person above the age of twenty-one years who is a citizen of the United States, or to any association of such persons, or to any corporation or municipality organized under the laws of the United States or of any State or Territory thereof: *Provided*, That a majority of the stock of such corporation shall at all times be owned and held by citizens of the United States: *And provided further*, That no railroad or common carrier shall be permitted to take or acquire, through lease or permit under this act, any coal or coal lands in excess of such area or quantity as may be required and used solely for its own use, and such limitation of use shall be expressed in all leases or permits issued to railroads or common carriers hereunder: *And provided further*, That any person, association, or corporation qualified to become a lessee under this act and owning any pending claim under the public-land laws to any coal lands in Alaska may, within one year from the passage of this act, enter into an arrangement with the Secretary of the

Interior by which such claim shall be fully relinquished to the United States; and if in the judgment of the Secretary of the Interior the circumstances connected with such claim justify so doing, the moneys paid by the claimant or claimants to the United States on account of such claim shall, by direction of the Secretary of the Interior, be returned and paid over to such person, association, or corporation as a consideration for such relinquishment.

All claims of existing rights to any of such lands in which final proof has been submitted and which are now pending before the Commissioner of the General Land Office or the Secretary of the Interior for decision shall be adjudicated within one year from the passage of this act.

Sec. 4. That a person, association, or corporation holding a lease of coal lands under this act may, with the approval of the Secretary of the Interior and through the same procedure and upon the same terms and conditions as in the case of an original lease under this act, secure a further or new lease covering additional lands contiguous to those embraced in the original lease, but in no event shall the total area embraced in such original and new leases exceed in the aggregate two thousand five hundred and sixty acres.

That upon satisfactory showing by any lessee to the Secretary of the Interior that all of the workable deposits of coal within a tract covered by his or its lease will be exhausted, worked out, or removed within three years thereafter, the Secretary of the Interior may, within his discretion, lease to such lessee an additional tract of land or coal deposits, which, including the coal area remaining in the original lease, shall not exceed two thousand five hundred and sixty acres, through the same procedure and under the same competitive conditions as in case of an original lease.

Sec. 5. That, subject to the approval of the Secretary of the Interior, lessees holding under leases small blocks or areas may consolidate their said leases or holdings so as to include in a single holding not to exceed two thousand five hundred and sixty acres of contiguous lands.

Sec. 6. That each lease shall be for such leasing block or tract of land as may be offered or applied for, not exceeding in area two thousand five hundred and sixty acres of land, to be described by the subdivisions of the survey, and no person, association, or corporation, except as hereinafter provided, shall be permitted to take or hold any interest as a stockholder or otherwise in more than one such lease under this act, and any interest held in violation of this proviso shall be forfeited to the United States by appropriate proceedings instituted by the Attorney General for that purpose in any court of competent jurisdiction, except that any such ownership and interest hereby forbidden which may be acquired by descent, will, judgment, or decree may be held for two years, and not longer, after its acquisition.

Sec. 7. That any person who shall purchase, acquire, or hold any interest in two or more such leases, except as herein provided, or who shall knowingly purchase, acquire, or hold any stock in a corporation having an interest in two or more such leases, or who shall knowingly sell or transfer to one disqualified to purchase, or except as in this act specifically provided, disqualified to acquire, any such interest, shall be deemed guilty of a felony, and upon conviction shall be punished by imprisonment for not more than three years and by a fine not exceeding \$1,000: *Provided*, That any such ownership and interest hereby forbidden which may be acquired by descent, will, judgment, or decree may be held two years after its acquisition and not longer, and in case of minority or other disability such time as the court may decree.

Sec. 8. That any director, trustee, officer, or agent of any corporation holding any interest in such a lease who shall, on behalf of such corporation, act in the purchase of any interest in another lease, or who shall knowingly act on behalf of such corporation in the sale or transfer of any such interest in any lease held by such corporation to any corporation or individual holding any interest in any such a lease, except as herein provided, shall be guilty of a felony and shall be subject to imprisonment for a term of not exceeding three years and a fine of not exceeding \$1,000.

Sec. 8a. If any of the lands or deposits leased under the provisions of this act shall be subleased, trusted, possessed, or controlled by any device permanently, temporarily, directly, indirectly, tacitly, or in any manner whatsoever, so that they form part of or are in anywise controlled by any combination in the form of an unlawful trust, with consent of lessee, or form the subject of any contract or conspiracy in restraint of trade in the mining or selling of coal, entered into by the lessee, or of any holding of such lands by any individual, partnership, association, corporation, or control, in excess of two thou-

sand five hundred and sixty acres in the Territory of Alaska, the lease thereof shall be forfeited by appropriate court proceedings.

SEC. 9. That for the privilege of mining and extracting and disposing of the coal in the lands covered by his lease the lessee shall pay to the United States such royalties as may be specified in the lease, which shall not be less than two cents per ton, due and payable at the end of each month succeeding that of the shipment of the coal from the mine, and an annual rental, payable at the beginning of each year, on the lands covered by such lease, at the rate of twenty-five cents per acre for the first year thereafter, fifty cents per acre for the second, third, fourth, and fifth years, and \$1 per acre for each and every year thereafter during the continuance of the lease, except that such rental for any year shall be credited against the royalties as they accrue for that year. Leases may be for periods of not more than fifty years each, subject to renewal, on such terms and conditions as may be authorized by law at the time of such renewal. All net profits from operation of Government mines, and all royalties and rentals under leases as herein provided, shall be deposited in the Treasury of the United States in a separate and distinct fund to be applied to the reimbursement of the Government of the United States on account of any expenditures made in the construction of railroads in Alaska, and the excess shall be deposited in the fund known as the Alaska Fund, established by the act of Congress of January twenty-seventh, nineteen hundred and five, to be expended as provided in said last-mentioned act.

SEC. 10. That in order to provide for the supply of strictly local and domestic needs for fuel the Secretary of the Interior may, under such rules and regulations as he may prescribe in advance, issue to any applicant qualified under section three of this act a limited license or permit granting the right to prospect for, mine, and dispose of coal belonging to the United States on specified tracts not to exceed ten acres to any one person or association of persons in any one coal field for a period of not exceeding ten years, on such conditions not inconsistent with this act as in his opinion will safeguard the public interest, without payment of royalty for the coal mined or for the land occupied: *Provided*, That the acquisition of holding of a lease under the preceding sections of this act shall be no bar to the acquisition, holding, or operating under the limited license in this section permitted. And the holding of such a license shall be no bar to the acquisition or holding of such a lease or interest therein.

SEC. 11. That any lease entry, location, occupation, or use permitted under this act shall reserve to the Government of the United States the right to grant or use such easements in, over, through, or upon the land leased, entered, located, occupied, or used as may be necessary or appropriate to the working of the same or other coal lands by or under authority of the Government and for other purposes: *Provided*, That said Secretary, in his discretion, in making any lease under this act, may reserve to the United States the right to lease, sell, or otherwise dispose of the surface of the lands embraced within such lease under existing law or laws hereafter enacted in so far as said surface is not necessary for use by the lessee in extracting and removing the deposits of coal therein. If such reservation is made, it shall be so determined before the offering of such lease.

That the said Secretary during the life of the lease is authorized to issue such permits for easements herein provided to be reserved, and to permit the use of such other public lands in the Territory of Alaska as may be necessary for the construction and maintenance of coal washeries or other works incident to the mining or treatment of coal, which lands may be occupied and used jointly or severally by lessees or permittees, as may be determined by said Secretary.

SEC. 12. That no lease issued under authority of this act shall be assigned or sublet except with the consent of the Secretary of the Interior. Each lease shall contain provisions for the purpose of insuring the exercise of reasonable diligence, skill, and care in the operation of said property, and for the safety and welfare of the miners and for the prevention of undue waste, including a restriction of the workday to not exceeding eight hours in any one day for underground workers except in cases of emergency, provisions securing the workers complete freedom of purchase, requiring the payment of wages at least twice a month in lawful money of the United States, and providing proper rules and regulations to secure fair and just weighing or measurement of the coal mined by each miner, and such other provisions as are needed for the protection of the interests of the United States, for the prevention of monopoly, and for the safeguarding of the public welfare.

SEC. 13. That the possession of any lessee of the land or coal deposits leased under this act for all purposes involving adverse claims to the leased property shall be deemed the possession of the United States, and for such purposes the lessee shall occupy the same relation to the property leased as if operated directly by the United States.

SEC. 14. That any such lease may be forfeited and canceled by appropriate proceeding in a court of competent jurisdiction whenever the lessee fails to comply with any provision of the lease or of general regulations promulgated under this act; and the lease may provide for the enforcement of other appropriate remedies for breach of specified conditions thereof.

SEC. 15. That on and after the approval of this act no lands in Alaska containing deposits of coal withdrawn from entry or sale shall be disposed of or acquired in any manner except as provided in this act: *Provided*, That the passage of this act shall not affect any proceeding now pending in the Department of the Interior, and any such proceeding may be carried to a final determination in said department notwithstanding the passage hereof: *Provided further*, That no lease shall be made, under the provisions hereof, of any land, a claim for which is pending in the Department of the Interior at the date of the passage of this act, until and unless such claim is finally disposed of by the department adversely to the claimant.

SEC. 16. That all statements, representations, or reports required, unless otherwise specified, by the Secretary of the Interior under this act shall be upon oath and in such form and upon such blanks as the Secretary of the Interior may require, and any person making false oath, representation, or report shall be subject to punishment as for perjury.

SEC. 17. That the Secretary of the Interior is authorized to prescribe the necessary and proper rules and regulations and to do any and all things necessary to carry out and accomplish the purposes of this act.

SEC. 18. That all acts and parts of acts in conflict herewith are hereby repealed.

#### COAL LANDS RESERVED.

The President of the United States is required by section 2 of the leasing act to "designate and reserve from use, location, sale, lease, or disposition, not exceeding 5,120 acres of coal-bearing land in the Bering River field, and not exceeding 7,680 acres of coal-bearing land in the Matanuska field," before opening the fields under the provisions of the act. The unreserved coal lands are thereafter to be "divided by the Secretary of the Interior into leasing blocks or tracts of 40 acres each or multiples thereof, and in such form as, in the opinion of the Secretary, will permit the most economical mining of the coal in such blocks, but in no case exceeding 2,560 acres in any one leasing block or tract." The lands having been thus divided into leasing blocks, the Secretary under the act is authorized, then and not before, to offer such blocks or tracts for leasing and award leases thereof through such plan as he may adopt, either by advertisement, competitive bidding, or otherwise.

It is recognized that if the Government were to reserve the total acreage allowed by law and were to select those areas that are believed to be best suited for profitable mining, the result might be to prevent effectually coal mining in Alaska until such time as the Government itself might undertake mine development and operation. The intention of Congress in passing the Alaska coal-leasing law is believed to have been the promotion of the mining of coal in the Territory as early as possible to meet the demands of the Government railroad, the Navy, and Alaskan consumers. The legal provision for Government reservation furnishes a means for safeguarding the public interest in the future, when lack of competition or other exigency may necessitate Government operation. The tracts now se-

lected for reservation in accord with this policy are therefore such as are believed to possess the average rather than the highest value.

The President has therefore designated and reserved from use, location, sale, lease, or disposition the lands described as follows:

*Lands reserved in Matanuska field, Seward base and meridian.*

- (1) T. 19 N., R. 6 E.: N.  $\frac{1}{2}$  NE.  $\frac{1}{4}$  and N.  $\frac{1}{2}$  NW.  $\frac{1}{4}$  sec. 4;  
NE.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ , W.  $\frac{1}{2}$  NE.  $\frac{1}{4}$  and NW.  $\frac{1}{4}$  sec. 5.
- T. 20 N., R. 6 E.: Lot 6 and E.  $\frac{1}{2}$  SE.  $\frac{1}{4}$  sec. 31;  
Lots 4, 5, 6, and 7 and SE.  $\frac{1}{4}$  and SW.  $\frac{1}{4}$  sec. 32;  
Lots 3, 4, 5, and 6, S.  $\frac{1}{2}$  SE.  $\frac{1}{4}$ , SW.  $\frac{1}{4}$  sec. 33, containing 1,446.17 acres.
- (2) T. 20 N., R. 5 E.: NE.  $\frac{1}{4}$ , SE.  $\frac{1}{4}$ , E.  $\frac{1}{2}$  NW.  $\frac{1}{4}$  and E.  $\frac{1}{2}$  SW.  $\frac{1}{4}$  sec. 20;  
NW.  $\frac{1}{4}$ , SW.  $\frac{1}{4}$ , SE.  $\frac{1}{4}$  and S.  $\frac{1}{2}$  NE.  $\frac{1}{4}$  sec. 21;  
SW.  $\frac{1}{4}$  and S.  $\frac{1}{2}$  NW.  $\frac{1}{4}$  sec. 22;  
NW.  $\frac{1}{4}$  sec. 27;  
NE.  $\frac{1}{4}$  and NW.  $\frac{1}{4}$  sec. 28;  
E.  $\frac{1}{2}$  NE.  $\frac{1}{4}$  and NW.  $\frac{1}{4}$  NE.  $\frac{1}{4}$  sec. 29, containing 1,880 acres.

*Lands reserved in Bering River field, Copper River base and meridian.*

- (3) T. 16 S., R. 8 E.: Secs. 23 and 24, containing 1,280 acres.
- (4) T. 16 S., R. 8 E.: NE.  $\frac{1}{4}$ , SE.  $\frac{1}{4}$  and SW.  $\frac{1}{4}$ , sec. 33.
- T. 17 S., R. 8 E.: N.  $\frac{1}{2}$  NW.  $\frac{1}{4}$  sec. 3;  
All of sec. 4;  
E.  $\frac{1}{2}$  NE.  $\frac{1}{4}$  and E.  $\frac{1}{2}$  SE.  $\frac{1}{4}$  sec. 5;  
E.  $\frac{1}{2}$  NE.  $\frac{1}{4}$  sec. 8;  
N.  $\frac{1}{2}$  NW.  $\frac{1}{4}$  sec. 9, containing 1,520 acres.
- (5) T. 17 S., R. 7 E.: Lot 3 and SE.  $\frac{1}{4}$  SE.  $\frac{1}{4}$  sec. 8;  
Lots 1 and 2, SE.  $\frac{1}{4}$  NW.  $\frac{1}{4}$ , SW.  $\frac{1}{4}$  and W.  $\frac{1}{2}$  NE.  $\frac{1}{4}$  sec. 9;  
NW.  $\frac{1}{4}$  NW.  $\frac{1}{4}$  sec. 16;  
SE.  $\frac{1}{4}$ , NE.  $\frac{1}{4}$ , NW.  $\frac{1}{4}$  and W.  $\frac{1}{2}$  SW.  $\frac{1}{4}$  sec. 17;  
NE.  $\frac{1}{4}$ , SE.  $\frac{1}{4}$ , SE.  $\frac{1}{4}$  NW.  $\frac{1}{4}$ , E.  $\frac{1}{2}$  SW.  $\frac{1}{4}$  and lots 3 and 4 sec. 18, containing 1,556.98 acres.

In addition to these tracts, the President, June 18, 1917, designated and reserved, in the Matanuska field, Seward base and meridian, coal leasing block No. 12, as follows:

- T. 20 N., R. 5 E.: S.  $\frac{1}{2}$  SE.  $\frac{1}{4}$ , sec. 24;  
NE.  $\frac{1}{4}$ , sec. 25.
- T. 20 N., R. 6 E.: S.  $\frac{1}{2}$  SW.  $\frac{1}{4}$ , sec. 19.  
NW.  $\frac{1}{4}$ , sec. 30, containing 480 acres.

December 5, 1917, the President designated and reserved, in the Matanuska field, Seward base and meridian, coal leasing block No. 7, as amended, as follows:

- T. 19 N., R. 3 E.: E.  $\frac{1}{2}$  SE.  $\frac{1}{4}$ , sec. 8;  
S.  $\frac{1}{2}$ , sec. 9;  
SW.  $\frac{1}{4}$ , sec. 10;  
NW.  $\frac{1}{4}$ , sec. 15;  
N.  $\frac{1}{2}$  SW.  $\frac{1}{4}$ , N.  $\frac{1}{2}$  SE.  $\frac{1}{4}$ , sec. 16, containing 1,280 acres.

January 26, 1918, the President designated and reserved, in the Nenana field, Fairbanks base and meridian, the following tracts:

- T. 11 S., R. 7 W.: SE.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , sec. 29;  
All sec. 32.
- T. 12 S., R. 7 W.: S.  $\frac{1}{2}$  NW.  $\frac{1}{4}$ , SW.  $\frac{1}{4}$ , sec. 4;  
All sec. 5, containing 1,560 acres.

All of the coal land in the remainder of these fields is open to application for lease, and none of this open territory will be withdrawn or reserved while there is any bona fide application for a lease thereon.

## UNRESERVED LANDS.

As noted in the foregoing statement the *unreserved* lands in the coal fields must be divided by the Secretary into leasing "blocks" or "tracts" before he can make a leasing offer. A survey of said lands in accordance with the system of public-land surveys is therefore necessary, as the act requires each leasing block or tract to be described by subdivisions of the survey. To this end such a survey of the Bering River and Matanuska fields has been made and the known coal lands in those fields divided into leasing blocks, as shown on the maps of those fields (in pocket).

## GENERAL REGULATIONS.

(1) By authority of the act of Congress approved October 20, 1914 (38 Stat. 741), the unreserved surveyed coal lands in the Bering River and the Matanuska coal fields, Alaska, have been divided into leasing blocks, or tracts, of 40 acres, or multiples thereof, and leases of such blocks or tracts, with the privilege of mining and disposing of the coal, lignite, and associated minerals therein may be procured from the United States in the following manner:

(2) On request addressed to the Commissioner of the General Land Office at Washington, D. C., a blank application and lease will be furnished the applicant; also, those who desire may procure from the Superintendent of Documents, Government Printing Office, Washington, D. C., a folio containing photolithographic copies of the approved plats of the topographic and subdivisional township surveys of the Matanuska field (13 townships) for \$1, and of the Bering River field (8 townships) for 75 cents.

(3) From and after June 1, 1916, until August 1, 1916,<sup>\*</sup> applications for coal-mining leases will be received at the General Land Office from duly qualified applicants.

Under this act the qualifications of such lessees are defined as follows:

(a) Any person above the age of 21 who is a citizen of the United States.

(b) Any association of such persons (that is, citizens of the United States over 21 years of age).

(c) Any corporation or municipality organized under the laws of the United States, or of any State or Territory thereof, "*Provided, That a majority of the stock of such corporation shall at all times be owned and held by citizens of the United States.*"

(4) The total area that may be embraced in one lease is fixed at 2,560 acres, which may include one or more contiguous leasing blocks, or tracts, as shown on the map; and no person, association, or corporation is permitted to take or hold any interest as a stockholder or otherwise in more than one lease under this act.

(5) The application blank calls for information as to the name of the applicant, a description of the leasing block or blocks desired, amount of capital proposed as an investment under the lease, time when actual development under the lease will begin, experience in coal mining, and reference as to financial standing.

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<sup>\*</sup> As amended June 13, 1916.

(6) The statute under which these proceedings are authorized provides that the Secretary of the Interior may award leases "through advertisement, competitive bidding, or such other methods as he may by general regulation adopt," and the purpose of the applications required herein is to procure such information as will best enable the Secretary to award leases so as to procure the best terms on behalf of the United States, and the most effective development of the coal deposits of the Territory.

(7) When the time fixed for filing such applications shall have expired all applications then on file will be promptly listed and the proposed terms thereunder will be noted. Thereafter due publication at the expense of the Government for not less than once a week for a period of 30 days will follow in at least two newspapers of general circulation, one of which shall be published in the Territory of Alaska and one in the United States proper, of the applications filed, each to be designated by a number and not by the name of the applicant, the block or blocks applied for, with the announcement that at the expiration of the period of publication the said applications will be taken up and the proposals therein considered, subject to any better terms that may be offered by any other qualified applicant during the period of publication, or by the first applicant.<sup>6</sup>

(8) All applications for a lease, or proposals in connection therewith, pending at the expiration of the period of publication will be submitted to the Secretary of the Interior in one report, with specific recommendations as to the awards that should be made or denied under the several applications or proposals; and thereafter such action will be taken by the Secretary on the report as may in his discretion seem warranted on the showing made in each case, by which he will obtain the largest investment proportionate to the acreage of the lease, and the earliest actual development of the coal mine on a commercial basis, reserving the right to modify proposed leasing blocks, or tracts, if the economical mining of the coal will better be procured thereby, or finally to reject any or all applications if, in his judgment, the interests of the United States so require.

(9) An actual beneficial expenditure on the ground for mining development and improvement purposes of \$100 for each acre included within the lease for which application is made will be adopted as the minimum basis upon which the proposed investments of the several applicants will be considered and adjudged, with the requirement that not less than one-fifth of the proposed investment shall be expended in the development of the mine during the first year, and a like sum each succeeding year, for the period of four years,<sup>7</sup> excess investments in any year over such proportionate amount to be credited on the expenditure called for in the year ensuing. A bond, to be executed within 10 days after the signature of the lease, in the sum of one-half the amount to be expended each year, will be required of each lessee conditioned upon the expenditure of such sum within said period.

(10) The procedure prescribed in the foregoing is to procure the orderly consideration of all applications or proposals that may be submitted in accordance with the foregoing regulations and within

<sup>6</sup> As amended, Dec. 3, 1917 (46 L. D. 262).

<sup>7</sup> As amended May 17, 1917.

the period of time therein fixed; but when final action shall have been taken by the department upon the applications or proposals thus submitted any qualified applicant may thereafter apply for a leasing block or tract, and his application will be received and disposed of in the same manner and after like publication as herein provided.

(11) Lands found to contain coal but not divided into leasing blocks may be hereafter divided into such blocks, and the lands therein made the subject of a leasing offer, the rights of adjacent lessees to be given due consideration in any award that may be made under such offer.

#### PROSPECTING.

The coal-leasing act makes no provision for the right of an intending lessee to enter upon and explore coal fields embraced within a lease offer prior to submission of his application for a lease.

Such a right, if existent, would by implication carry with it some protection from the interference of others while engaged in such inspection as well as the exclusive benefit of any discoveries made thereby and amount in effect to a preference right based upon discovery; otherwise the right of exploration would be an empty privilege.

The entire scheme of section 3 of the act which governs the manner in which leases shall be awarded goes upon the theory that the Government is to offer "known" coal lands for leasing without priority of right recognized in either discovery, "opening a mine," or application, and "awarding leases thereof through advertisement, competitive bidding, or such other methods as he (the Secretary of the Interior) may by general regulations adopt."

All prospective applicants, however, will be accorded every opportunity to enter upon, inspect, and explore these coal fields at their pleasure in so far as such action may be necessary to acquire a thorough knowledge of field conditions, but no possessory or other right, either as against other prospectors or applicants or the United States, shall be acquired thereby.

#### USE OF TIMBER.

The use of timber by the lessee, in addition to that taken from the leasehold under the terms of the lease, may be secured by him from other lands not embraced in leasing units in accordance with the regulations that may be prescribed by the Secretary of the Interior under the act of May 14, 1898 (30 Stat. 414), and the acts amendatory thereof, or by arrangement with the Department of Agriculture if from a national forest.

#### LEASES AND PERMITS AND APPLICATIONS THEREFOR.

##### COAL-MINING LEASE.

THIS INDENTURE OF LEASE, entered into, in quintuplicate, this \_\_\_\_\_ day of \_\_\_\_\_, A. D. 19\_\_\_\_, by and between the United States of America, acting in this behalf by \_\_\_\_\_, Secretary of the Interior, party \_\_\_\_\_, Date. Parties.

of the first part, hereinafter called the lessor, and-----

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 party of the second part, hereinafter called the lessee,  
 under and pursuant to the act of Congress, approved  
 October 20, 1914 (38 Stat. 741), entitled "An act to  
 provide for the leasing of coal lands in the Territory of  
 Alaska, and for other purposes," hereinafter called the  
 "coal leasing act,"

WITNESSETH.

Purposes.

That the lessor, in consideration of the rents and  
 royalties to be paid and the covenants to be observed  
 as hereinafter set forth, does hereby grant and lease to  
 the lessee, for the period of fifty years from the date  
 hereof, the exclusive right and privilege to mine and  
 dispose of all the coal and associated minerals in, upon,  
 or under the following described tracts of land, situated  
 in the Territory of Alaska, to wit: -----

Description of  
 land.

Mining and sur-  
 face rights.

-----  
 containing ----- acres, more or less, together with  
 the right to construct coke ovens, briquetting plants,  
 by-products plants, and all such other works as may be  
 necessary and convenient for the mining and prepara-  
 tion of coal and associated minerals for market, the  
 manufacture of coke or other products of coal, and to  
 use so much of the surface and the sand, stone, timber,  
 and water thereon as may reasonably be required in  
 the exercise of the rights and privileges herein granted,  
 the use of such timber to be subject to such regulations  
 as may be prescribed by the Secretary of the Interior  
 under the act approved May 14, 1898 (30 Stat. 414),  
 and the acts amendatory thereof.

ARTICLE I.

Rights reserved  
 by lessor.

SECTION 1. The lessor expressly reserves unto itself  
 the right to grant or use such easements in, over, through,  
 or upon the land leased, entered, located, occupied, or  
 used as may be necessary or appropriate to the work-  
 ing of the same or other coal lands by or under authority  
 of the Government and for other purposes; also the right  
 to use, lease, or dispose of so much of the surface of the  
 said lands as may not be actually needed or occupied by  
 the lessee in the conduct of mining operations.

ARTICLE II.

Lease subject to  
 "coal leasing  
 act."

It is expressly understood and agreed that this lease  
 is granted subject in all respects to the conditions,  
 limitations, penalties, and provisions contained in the  
 "coal leasing act," which act is hereby made a part  
 hereof to the same extent as if incorporated herein.

## ARTICLE III.

It is further expressly understood and agreed that the mining rights and privileges leased as aforesaid shall extend to and include only coal and associated minerals, as hereinafter defined, and that no rights or privileges respecting any other kind or character of mineral, or mineral substance whatsoever, are granted or intended to be granted by this lease.

Mining rights  
limited to coal  
and associated  
minerals.

## ARTICLE IV.

The lessee in consideration of the lease of the rights and privileges aforesaid hereby covenants and agrees as follows:

SECTION 1. To invest in actual mining operations upon the leasing block included herein, the sum of -----

Investment.

-----  
dollars, of which sum not less than one-fifth shall be so expended during the first year succeeding the execution of this instrument, and a like sum each succeeding year for the period of four years; to furnish a bond, within 10 days after signature of the lease, in the sum of one-half the amount to be expended each year, conditioned upon the expenditure of such sum within said period, and submit annually, at the expiration of each year for the said period, an itemized statement as to the amount and character of the expenditure during said year.

SEC. 2. To pay as an annual rental for each acre or part thereof covered by this lease the sum of 25 cents per acre for the first year, payment of which amount is hereby acknowledged, the sum of 50 cents per acre per year for the second, third, fourth, and fifth years, and \$1 per acre for the sixth and each succeeding year during the life of this lease, all such annual payments of rental to be made on the anniversary of the date hereof, and to be credited on the first royalties to become due hereunder during the year for which said rental was paid.

Annual rental.

SEC. 3. To pay a royalty of 2 cents on every ton of 2,000 pounds of coal shipped or removed from the leased lands or manufactured into coke, briquets, or other products of coal, or consumed on the premises, during the first five years succeeding the execution of this lease, and 5 cents per ton for the next 20 years. Royalties shall be payable at the end of each calendar month next succeeding that of the said shipment, removal, donation, manufacture, or consumption.

Royalty.

SEC. 4. To accurately weigh all coal shipped or removed from the leased premises, sold, or donated to local trade, manufactured into coke, briquets, or other products of coal, or otherwise consumed or utilized, and to accurately enter the weight or weights thereof in due form in books to be kept and preserved by the lessee for

Lessee to keep  
record of all coal  
shipped.

such purpose, together with the car numbers, if any, of the coal shipped by rail.

Reports to be  
furnished month-  
ly by lessee.

SEC. 5. To furnish in manner and form and at such time during each calendar month as the lessor shall prescribe, but in no event later than the last day thereof, the following written reports covering the month immediately preceding, certified under oath by the superintendent at the mine or by such other agent on the property having personal knowledge of the facts as may be designated by the lessee for such purpose, to wit:

A report copied from the books required to be kept at the mine under section 4 of this article showing the facts required to be entered therein; a report of the number of mine cars of mine-run coal hoisted or trammed from each coal bed of each separate mine; a report showing the quantity, size, and character of coal shipped, used for power purposes and lease consumption; donated to employees, manufactured into coke, briquets, or other products or by-products of coal; in storage on the premises, with the quantity of coal of various sizes added thereto and taken therefrom during the month.

#### ARTICLE V.

Periods for re-  
adjustment of roy-  
alty.

It is mutually understood and agreed that the lessor shall have the right to readjust and fix the royalties payable hereunder at the end of 25 years from the date hereof, and at the end of 15 years thereafter, and thereafter at the end of each succeeding 10-year period during the continuance of this lease: *Provided*, That in any such readjustment the royalty fixed shall not exceed 5 per cent of the average selling price of coal of like character at the mine, per ton of 2,000 pounds in the coal field embracing the tracts covered by this lease, as shown by the books of the lessees operating in said field during a period of five years next preceding such readjustment.

#### ARTICLE VI.

This lease is made subject to the following provisions, which the lessee accepts and covenants faithfully to perform and observe:

Mining opera-  
tions to be ener-  
getically prose-  
cuted.

SECTION 1. The lessee shall diligently proceed to prospect for, develop, and mine the coal in or upon the leased lands; shall carry on all mining operations in a good and workmanlike manner, having due regard to the health and safety of miners and other employees; and shall leave no available coal abandoned which could be recovered by the most approved methods of mining when in the regular course of mining operations the time shall arrive for mining such coal. No mine, entry, level, or group of rooms or workings shall be permanently abandoned and rendered inaccessible, save with the approval of the authorized representative of the lessor.

Workings not  
to be abandoned  
until examina-  
tion made.

SEC. 2. And also shall develop and mine the coal in the leased lands in accordance with a system to be shown by a preliminary plan on a scale of not more than 200 feet to the inch and a written description thereof, which plan and description shall be submitted for approval by the authorized representative of the lessor.

Preliminary plan of mining to be submitted in advance of operations on a commercial scale.

SEC. 3. And also where more than one bed of coal is known to exist in the leased lands, shall not draw or remove the pillars in any lower bed before the available coal in any or all upper beds has been mined, unless it shall be decided by the authorized representative of the lessor that the workings in any or all of the upper beds will not be seriously injured by the extraction of the pillar coal in the lower workings. Where mining operations are being carried on in a bed that lies either below or above another bed in which mining has been or is being carried on and in which the pillars have not been pulled, and where the vertical distance between the two beds is less than fifteen times the thickness of the lower of the two beds, the lessee shall, as far as practicable, so arrange the pillars that those in the lower bed shall be vertically beneath those in the upper bed. Where practicable, by reason of either commercial or mining conditions, the available coal in the upper beds shall be exhausted before the coal in the lower beds is mined.

Where two or more beds of coal pillars in lower beds to be left until coal in upper beds extracted.

Exceptions.

Pillars in lower beds to be arranged vertically under pillars in upper beds.

SEC. 4. And also shall not, without the consent in writing of the authorized representative of the lessor first had and obtained, mine any coal, or drive any underground working, or drill any lateral bore hole within 50 feet of any of the outside boundary lines of the leased lands, nor within such greater distance of such boundary lines, as the said representative shall prescribe for the protection of the property or the safeguarding of mining operations hereunder; but in the event the coal up to the like barrier in adjoining premises shall have been worked out and exhausted, and the water therein shall have been lowered below the working level of the operations on the same bed on the lands covered by the lease, the lessee hereunder hereby agrees, upon the written demand of said representative, to mine out and remove all the available coal in such barriers, both in the lands covered by this lease and on the adjoining premises, whenever same can be mined without hardship to the lessee and where the coal-mining rights in such adjoining premises are owned by the lessor.

Fifty-foot barrier pillars.

Lessee may be required to mine barrier pillars on adjacent lands.

SEC. 5. And also where the "room-and-pillar" or any other system of mining is followed which requires advance workings in the solid coal, including entries, breakthroughs, and rooms, instead of a system of mining under which all the coal is mined out and extracted as the work advances, shall not, without the consent in writing of the lessor being first had and obtained, mine and remove from such advance workings more than the follow-

Limitations of coal to be recovered in advance workings under "room-and-pillar" system.

ing maximum percentages of the coal area for the specified depths of cover, viz:

Not more than 70 per cent where the cover is 100 feet or over but less than 200 feet in depth; not more than 65 per cent where the cover is 200 feet or over but less than 300 feet in depth; not more than 60 per cent where the cover is 300 feet or over but less than 400 feet in depth; not more than 55 per cent where the cover is 400 feet or over but less than 500 feet in depth; not more than 50 per cent where the cover is 500 feet or over but less than 750 feet in depth; not more than 45 per cent where the cover is 750 feet or over but less than 1,000 feet in depth; not more than 40 per cent where the cover is 1,000 feet or over but less than 1,250 feet in depth; not more than 35 per cent where the cover is 1,250 feet or over but less than 1,500 feet in depth; not more than 30 per cent where the cover is 1,500 feet or over but less than 1,750 feet in depth; not more than 25 per cent where the cover is 1,750 feet or over but less than 2,000 feet in depth; not more than 20 per cent where the cover is 2,000 feet or over.

Definition of term "percentage of area."

The said coal areas shall mean an area parallel with the dip or raise of the coal bed. The percentages of coal areas specified shall mean the percentages of coal to be mined in the areas comprised in the advance workings as compared with the percentages of coal to be left standing in such workings, and shall not be construed to mean the percentage of the total amount of coal in any such area of any such bed where such bed in such area is thicker than the height of any such workings, nor shall such percentages of areas be held to include the coal extracted from the pillars in any such area, panel, or district of the mine, as it is the intent of the parties hereto that, save as otherwise provided in this lease, and except where the retention of pillars shall be necessary for the maintenance of main roads or passageways or for the protection of the property, all such pillars shall be mined and removed as rapidly as proper mining will permit.

Pillars to be removed as rapidly as possible.

Exceptions.

Fires in mine prohibited.

SEC. 6. And also shall not, save as hereinafter authorized, light, keep, or maintain any fire in any mine or stripping, except as approved by the authorized representative of the lessor, or underground in any mine, or in contact with the coal in place or in or along the outcrop of any coal bed. Failure to take prompt and vigorous steps for the extinguishment of any such fire shall be sufficient ground for the entry of the lessor and the cancellation of this lease.

Discovery of valuable mineral substance other than coal to be reported.

Lessee to have free use of fire clay and natural gas for lease purposes.

SEC. 7. And also shall promptly notify the authorized representative of the lessor of the discovery of any valuable mineral or mineral substance other than coal in the course of mining operations hereunder, and shall not mine or remove same unless the same is an associated mineral as hereinafter defined: *Provided*, That such quan-

titles of fire clay, shale, or gas from the coal measures as may be required by the lessee in the conduct of operations hereunder may be removed and used without such written permission and without payment of royalty therefor. The lessee shall keep careful and accurate record in manner and form as may be prescribed by the lessor of all such associated minerals mined, used, or carried away, and shall pay such rates of royalty thereon as may be fixed by the said lessor, except as above provided.

Record of associated minerals mined to be kept.

SEC. 8. And also shall keep at the mine office clear, accurate, and detailed maps on a scale of 100 feet to the inch, in the form of a horizontal projection on tracing cloth, of the workings in each coal bed in each separate mine on the leased lands, a separate map to be made for each such bed, and for the surface immediately over the underground workings, and to be so arranged with reference to a public land corner that the maps can be readily superimposed.

Mine map required to be kept at the mine office.

Each map of the workings in any coal bed shall show the location of all openings connecting such bed with the workings in any other bed, or with any adjacent mine, or with the surface; the location of all entries, gangways, rooms, or breasts, and any other narrow or wide workings, including the outlines of abandoned workings, and record of whether accessible or inaccessible; also barrier pillars, refuge chambers, stoppings, ventilating doors, overcasts, undercasts, regulators, and direction of air currents at the time of making map; location of stationary haulage and hoisting engines; permanent electrical generators, dynamos, and transformers; indications of trolley roads throughout their extent; also fire walls, sumps, and large bodies of standing water; position of main pumps and fire pipe lines; there shall also be marked on such maps the elevations above or below sea level or approved datum at points not over 220 feet apart horizontally, or over 100 feet apart vertically, in all main slopes, entries, levels, or headings, together with the thickness of coal beds at such intervals, and the elevations at the tops and bottoms of all shafts, slopes, and inclines.

Things required to be shown on detailed map of workings.

The map of the surface immediately over the mine workings shall show all prominent topographic features and culture, section and township lines, the elevations above sea level or an approved datum, and contours at vertical intervals of 25 feet of such topographic features. Such map, together with the maps of the underground workings, shall be brought up to date not less than once in every six months.

Requirements for map of surface over working.

The lessee shall also make and keep at the mine office, at such time after the commencement of mining operations as the authorized representative of the lessor may direct, a clear and accurate general map of the entire

Things required to be shown on general property map to be kept at mine office.

leased lands, on a scale of 400 feet to the inch. Such map shall show all prominent topographical features and culture; the location of the surface areas immediately over the mine workings shown on the detailed surface map hereinbefore required; township, section, and property lines; the location of high-water marks; the outline of coal outcrops where known; the outlines of the chief mine workings, indicating the workings in each separate coal bed by distinguishing marks and the elevations above sea level or an approved datum, and contours at vertical intervals of 25 feet of the chief topographic features. Such map shall be brought up to date not less than once in every six months.

Prints of maps  
to be furnished  
lessor.

Blue prints or reproductions in duplicate of the maps required as aforesaid shall be furnished the authorized representative of the lessor when made, and supplemental prints or reproductions in duplicate furnished on or before January 1 of each succeeding year, showing the extensions, additions, and changes since the last map or supplement was submitted. All mine progress maps kept by the lessee shall at all times be subject to examination by said representative.

Abandoned  
areas to be surveyed  
and mapped.

The lessee whenever any mine, or any workings therein are to be abandoned or indefinitely closed, and before same shall be abandoned or closed, or allowed to become inaccessible, shall make a survey thereof so as to accurately show the entire worked-out area or areas, and shall extend the results of such survey on the map or maps of the underground workings hereinbefore required, and promptly forward blue prints or reproductions thereof in duplicate to the said representative.

Maps may be  
made at lessee's  
expense in case  
of failure to furnish.

If the lessee shall fail to make or furnish any map or extension or revision as herein required within 90 days after demand therefor shall have been made by the authorized representative of the lessor, such representative may employ a competent engineer to make a survey of the mine, and plat the same as above provided, the expense thereof to be paid by the lessee, and in the event that the lessee shall fail to make such payment within 60 days after demand therefor by the authorized representative of the lessor, such failure shall constitute a cause of forfeiture of this lease.

Second exit to  
surface to be  
provided, where  
more than 10  
men employed on  
a shift.

SEC. 9. And also shall, where more than ten men are employed underground on any one shift in any separate mine, provide an escapeway or second exit to the surface, which shall be separated at the surface from the first exit by not less than 50 feet of strata in case of drift, slope, or tunnel workings, or in case of vertical shafts, or of inclined shafts having a pitch of more than 45°, by not less than 200 feet of strata. An escapeway or outlet through an adjoining mine shall be regarded as a satisfactory compliance with this requirement if kept at all time in proper condition for use. If such adjoining mine shall be abandoned at any time, or shall cease to operate

Outlet through  
adjacent mine  
sufficient compliance.

indefinitely, the lessee hereunder shall be solely responsible for the cost and expense of maintaining such outlet, and in the event such outlet shall be abandoned or permitted to become unsafe for use, the number of men employed on any one shift shall be reduced below ten until such time as a second exit or escapeway shall be provided.

SEC. 10. And also shall not employ more than five men underground on any one shift in any new working of any mine unless such new working shall be so connected with adjacent workings as to provide two distinct and separate means of escape from such new working: *Provided*, That with the approval of the authorized representative of the lessor, not exceeding ten men may be so employed in advance of the making of such second opening, but in no case shall any rooms, drifts, or slopes be opened or worked until such second opening is constructed.

Not more than five men to be employed in new workings unless second opening provided.  
Exceptions.

SEC. 11. And also shall not construct or maintain any structure of inflammable material within 75 feet of any mine opening; nor within said distance permit any structure of noninflammable material to be connected to any other structure by means of any structure or erection of inflammable material, or to be connected to any structure beyond said distance which shall be constructed of inflammable material, except as follows, that is to say:

No building of inflammable material to be constructed within 75 feet of any mine.

(a) An open timber framework or headframe of timber may be constructed over a shaft, slope, or incline.

Exceptions.

(b) The posts, studs, and rafters of any such structure may be of wood if the covering or lining is made of noninflammable material, but under no circumstances shall wood flooring be used, except in tipple and trestle structures.

SEC. 12. And also, except in a prospect opening, shall separate the main intake and return airways and all workings parallel to such airways by not less than 50 feet of strata except for break-throughs or crosscuts for ventilation or haulage, and shall provide for such greater distance between such airways or between any such airway and parallel workings as may be required in the judgment of the authorized representative of the lessor. The lessee agrees that the pillars thus provided for shall be left standing until in the proper course of mining operations the time shall arrive for their removal immediately prior to the final abandonment of the workings in that particular coal bed.

Main intake and return airways to be separated by not less than 50 feet of natural strata.

Pillars to be left standing until prior to final abandonment of mine.

SEC. 13. And also shall whenever more than ten men are employed underground on any one shift provide a fan or other mechanical means for circulating such amount of ventilating current as may be required by any law of the United States or of the Territory of Alaska now or hereafter enacted, or by the rules and regulations prescribed by the lessor, such fan or other mechanical means and the connection between same and the point

Ventilating fan to be provided where more than 10 men employed on shift.

Fan not to be placed in direct line with any mine entrance.

With written approval of lessor's representative furnace may be used for ventilation under specified conditions.

Slack and refuse to be disposed of so as not to become a public or private nuisance.

Abandoned workings to be covered or fenced.

Operations subject to inspection of lessor's representatives.

Lessee to furnish all necessary assistance.

Lessee to permit examination of books for purpose of checking royalty returns.

of the entrance of the air current into the mine to be made of noncombustible material; and the lessee shall not set same in line with the axis of any mine opening, but shall place same at a distance of not less than 15 feet from the projection of the nearest side of such opening, and shall provide explosion doors of the full area of the air shaft or airway, in direct line with any and all such mine openings in order to protect said fan or other mechanical means of air circulation in case of a mine explosion: *Provided*, That during such time as the mine is being opened up and less than ten men are employed underground on any one shift, and with the written approval of the authorized representative of the lessor, a furnace may be used for ventilation in a nongaseous mine if the fire box thereof is inclosed by brick, rock, or concrete walls, and a passageway around such inclosure at least two feet in width provided: *And provided further*, That if a wooden stack is used in connection with such furnace the lessee shall not permit such stack to be in contact with any coal bed or with any inflammable shale.

SEC. 14. And also shall make such provisions for the disposal of the waste, slack, and refuse of the mine that the same shall not be a nuisance, inconvenience, or obstruction to any right of way, stream, or other means of transportation or travel, or to any private or public lands, or embarrass the operation of any other mine on the leased lands, or on adjoining lands, or in any manner occasion private or public damage, nuisance, or inconvenience. All waste containing practically no coal shall be deposited separate and apart from waste containing coal and in accordance with the directions of the authorized representative of the lessor.

SEC. 15. And also shall upon abandonment substantially fence, fill in, cover, or close all surface openings or workings where persons or animals are likely to be injured by falling therein, or endangered by accumulations of gas, except as the lessor shall otherwise direct; and shall maintain all such fencing or covering in a secure condition during the term hereof.

SEC. 16. And also expressly agrees that all mining and related operations shall be subject to the inspection of authorized representatives of the lessor, and that such representatives, with all proper and necessary assistants, may at all reasonable times enter into and upon the leased lands and survey and examine same and all surface and underground improvements, works, machinery, equipment, and operations, and further expressly agrees to furnish said representatives and assistants all necessary assistance, conveniences, and facilities in making any such survey and examination.

SEC. 17. And also shall permit any authorized representative of the lessor to examine all books and records pertaining to operations under this lease, and to make

copies of and extracts from any or all of same, if desired. The information so derived to be held confidential.

SEC. 18. And also shall permit the lessor, its lessees, or transferees to make and use upon or under the leased lands any workings necessary for freeing any other mine from water, causing as little damage or interference as possible to or with the mine or mining operations of the lessee hereunder. Any such use by a lessee or transferee shall be conditioned upon the payment to the lessee hereunder of the amount of actual damages sustained thereby and adequate compensation for such use.

Lands leased and easements therein may be used for purposes of rendering operations on adjoining lands more safe; such use to be compensated for.

SEC. 19. And also shall accurately weigh or measure in the car and truly account for the coal mined and loaded by each miner, where the miners are paid either by the weight of their output or upon the basis of the measurement of the coal in the car; keep a correct record of all coal so weighed or measured; post or display such record daily for the inspection of the miners and other interested persons; and require the weighman or person appointed to measure the coal in the car where the miners are paid upon the basis thereof, before entering upon his duties, to make and subscribe to an oath before some person duly authorized to administer oaths that he will accurately weigh or measure and keep true record of the coal so weighed or measured and credit same to the miner entitled thereto, such affidavit to be kept conspicuously posted at the place of weighing, if any; but nothing contained herein shall be construed to prevent the lessee, in case rock and bone is loaded by the miner, from estimating or separately weighing and deducting the amount thereof from the weights of coal accredited to such miner. The lessee hereby agrees that if a majority of the miners employed on the leased lands so desire they shall be permitted to employ at their own expense one of their fellow employees to see that the coal is properly weighed or measured and that a correct account of same is kept, and agrees to afford such person every facility to certify the weights and measurements while the weighing or measuring is being done: *Provided*, That the lessee shall not be required to so do unless such person, before entering upon his duties, shall make and subscribe to an oath before some person authorized to administer oaths that he will faithfully discharge the duties of his position, such oath to be kept conspicuously posted at the place of weighing, if any.

Lessee to keep true and accurate weights or measurements of coal mined and loaded by miners.

Weighman to take oath for faithful discharge of duties.

Miners to be permitted to employ check weighman.

Check weighman to take oath for faithful discharge of his duties.

SEC. 20. And also shall pay all miners and other employees, both above and below ground, at least twice each month in lawful money of the United States, and shall permit such miners and other employees full and complete freedom of purchase, but with a view to increasing safety this provision shall not apply to the purchase of explosives, detonators, or fuses, and shall not require or permit miners or other employees, except in

Wages to be paid in lawful money.

Freedom of purchase to be allowed.

Eight-hour work day required.

Premises to be surrendered in proper condition for continuance of mining operations.

case of emergency, to work underground for more than eight hours in any one calendar day, not including time for lunch or meals or the time required to reach the usual working place.

SEC. 21. And also shall, at the expiration or earlier termination of this lease, deliver up to the lessor the lands covered by this lease, together with all fixtures, improvements, and appurtenances, save as hereinafter provided, in such a secure and proper state that mining operations may be continued immediately to the full extent and capacity of such mine.

#### ARTICLE VII.

Suspension of operations for more than three months without consent to be cause of forfeiture.

It is further mutually understood and agreed as follows:

Upon application consent for suspension for a specified period may be obtained.

SECTION 1. That the suspension of mining operations by the lessee for a longer period than three months without the consent in writing of the lessor or its authorized representatives shall be cause of forfeiture of this lease. If the lessee shall be unable to continue the operation of the mine for any cause, not due to the fault or negligence of the lessee, he shall be entitled to the suspension of operations for such a length of time, and upon payment of such minimum royalties, and such other conditions as may be specified in the order of suspension, but the issuance of any such order shall not excuse the payment of any rents or royalties due under this lease or prevent forfeiture for failure to pay same, and the acceptance of any such rent or royalty shall not waive any other right of the lessor hereunder.

Lease not to be assigned without consent of lessor.

SEC. 2. That the lessee shall not assign this lease or any interest therein, nor sublet any portion of the leased premises, or any of the rights and privileges herein granted, without the written consent of the lessor being first had and obtained.

Breach of lease covenants may be waived in writing.

SEC. 3. That the lessor or its authorized representative may by notice in writing waive any breach of the covenants and conditions contained herein, except such as are required by the aforesaid "coal leasing act," but any such waiver shall extend only to the particular breach so waived, and shall not limit the rights of the lessor with respect to any future breach. No waiver not in writing shall be in any way binding upon the lessor.

Lease may be terminated at any time upon payment of rents, etc.

SEC. 4. That the lessee may terminate this lease at any time upon giving four months' notice in writing to the lessor or its authorized representative, and upon payment of all rents, royalties, and other debts due and payable to the lessor, and upon payment of all wages or moneys due and payable to the workmen employed by the lessee, but in no case shall such termination be effective until the lessee shall have made provision for the preservation of any mine on the leased lands in accordance with the provisions of this lease: *Provided*, That in such case the

Termination not to be effective until property examined.

right of valuation and purchase, accorded the lessor in the section next following (5), shall be exercised within said period of four months.

SEC. 5. That at the expiration or earlier termination of this lease all tools, machinery, and equipment, including tracks, rails, and pipe placed by the lessee in the mine or on the property, shall before removal from normal position, if requested by the lessor or its authorized representatives, be valued by three disinterested and competent persons to be chosen in the manner hereinafter provided for the appointment of arbitrators, the valuation of these three or of a majority of them to be conclusive of the value of any or all of the said property; and the lessor or its agent, licensee, or lessee shall have the right to purchase within four months thereafter any or all such tools, machinery, equipment, or materials at the said valuation, deducting therefrom all rents, royalties, or other payments at that time due and payable by the lessee. If such valuation shall not be requested or the purchase shall not be made within said time, the lessee shall have the privilege of removing same from the premises within one year from the expiration or termination of this lease, provided all debts and moneys specified in section 4 of this article shall have been paid. The lessee shall not, and hereby covenants not to, remove any mine supports, timbers, or props in place. All buildings and improvements erected upon the leased lands shall become a part of the property, and machinery and equipment shall not be removed therefrom in such a way as to cause any permanent injury to such buildings or improvements.

Lessor to have privilege of valuing and purchasing equipment, etc., on termination of lease.

Lessee may remove same within year.

SEC. 6. That if the lessee shall make default in the performance or observance of any of the terms, covenants, and stipulations of this lease, and such default shall continue for 60 days after service of written notice thereof by the lessor or its authorized representatives, then all the rights and privileges of the lessee cease and determine, and the lessor may, by appropriate proceedings, have this lease forfeited and canceled in a court of competent jurisdiction.

Forfeiture of lease.

A waiver of any particular cause of forfeiture shall not prevent the cancellation and forfeiture of this lease for any other cause of forfeiture or for the same cause occurring at any other time.

SEC. 7. That in case any dispute shall arise between the lessor and lessee as to any question of fact; or as to the reasonableness of any requirement made by the lessor under the provisions of this lease, in the matter of operation, methods, means, expenditures, use of easements, compensation for joint occupancy by another lessee of a portion of the leased premises, or such other questions as are not determined by express statutory provision, such questions or disputes shall be settled by arbitration in the manner provided for by this section, and the lessor and

Questions which may be submitted to arbitration.

lessee hereby covenant and agree each with the other to promptly comply with and carry out the decision or award of each and every board of arbitration appointed under this section.

Manner of appointing arbitrators.

Questions in dispute to be determined by arbitration hereunder shall be referred to a board of arbitration consisting of three competent persons, one of which persons shall be selected by the lessor or its authorized representative, and one by the lessee, and the third by the two thus selected: *Provided*, That the lessor and lessee may agree upon one sole arbitrator or upon the third arbitrator. The party desiring such arbitration shall give written notice of the same to the other party, stating therein definitely the point or points in dispute, and name the person selected by such party hereto within 20 days after receiving such notice to name an arbitrator; and in the event it does not do so, the party serving such notice may select the second arbitrator and the two thus named shall select the third arbitrator. The arbitrators thus chosen shall give to each of the parties hereto written notice of the time and place of hearing, which hearing shall not be more than 30 days thereafter, and at the time and place appointed shall proceed with the hearing unless for some good cause, of which the arbitrators or a majority of them shall be the judge, it shall be postponed until some later day or date within a reasonable time. Both parties hereto shall have full opportunity to be heard on any question thus submitted, and the written determination of the board of arbitration thus constituted or of any two members thereof or, in case of the failure of any two members to agree, then the determination of the third arbitrator shall be final and conclusive upon the parties in reference to the questions thus submitted. All such determinations shall be in writing, and a copy thereof shall be delivered to each of such parties.

Decision of third arbitrator to be final.

New board to be chosen in event of failure of arbitrators first selected to choose a third.

It is further agreed that in the event of the failure of the lessor and lessee, or of the two arbitrators selected as aforesaid by the parties hereto, within 20 days from notice to them of their selection, to agree upon the third arbitrator, then the Secretary of the Interior shall appoint such arbitrator.

The said third arbitrator shall receive not to exceed \$15 per day as full compensation for his services and for all expenses connected therewith, exclusive of transportation charges; but such compensation shall not be in excess of \$150 for any arbitration. The losing party to such arbitration shall be liable for the payment of such compensation and transportation expenses of such third arbitrator.

SEC. 8. That any notice in writing as to any matter mentioned in this lease, addressed to the lessee and left upon the premises with the superintendent, manager, clerk, or other person in charge of the mine or of the office, or, in the absence of any such person, posted on the

door of the office, shall have the same force and effect as if served upon the lessee, and 15 days shall be considered a reasonable notice, unless a longer notice be herein provided for or be so provided in such notice.

#### ARTICLE VIII.

It is further expressly agreed and declared that the terms and phrases hereinafter mentioned shall have the meanings hereinafter assigned unless the context shall otherwise require, that is to say:

(a) The phrase "available coal" as used in this lease shall mean merchantable coal from any coal bed which, when reached in the prosecution of the lessee's operations hereunder, can be mined at a reasonable profit by the use of machinery and methods which at that time are modern and efficient.

(b) The term "mine" as used herein shall mean and include all underground workings now or hereafter opened or worked for the purpose of mining and removing coal and associated minerals, together with all buildings, machinery, and equipment, above and below ground, used in connection with such mining operations.

(c) The term "pit" or "open pit" shall mean and include stripping operations or any open-air workings.

(d) The term "coal" as used herein shall mean and include anthracite, semianthracite, semibituminous, bituminous, subbituminous, lignite, and graphitic coal, lignite, natural coke, and such bony coal as is suitable for use as a fuel.

(e) The term "associated minerals" as used herein shall mean and include fire clay, shale, sandstone, and the bedded materials of the coal measures, exclusive of gold-bearing or other metalliferous deposits.

(f) The term "lessee" as used herein shall mean and include the heirs, executors, administrators, successors, or assigns of the lessee hereinbefore specified.

#### ARTICLE IX.

It is further mutually covenanted and agreed that each obligation hereunder shall extend to and be binding upon, and every benefit hereof shall inure to, the heirs, executors, administrators, successors, or assigns of the respective parties hereto.

#### ARTICLE X.

It is also further agreed that no member of or delegate to Congress or resident commissioner, after his election or appointment, or either before or after he has qualified, and during his continuance in office, and that no officer, agent, or employee of the Department of the Interior,

shall be admitted to any share or part in this lease, or derive any benefit that may arise therefrom, and the provisions of section 3741 of the Revised Statutes of the United States and sections 114, 115, 116 of the Codification of the Penal Laws of the United States approved March 4, 1909 (35 Stat., 1109) relating to contracts enter into and form a part of this lease so far as the same may be applicable.

In witness whereof—

THE UNITED STATES OF AMERICA,  
By \_\_\_\_\_ [L. S.]  
*Secretary of the Interior.*

Witnesses:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_ [L. S.]

#### APPLICATION FOR COAL-MINING LEASE.

The undersigned, \_\_\_\_\_,  
a resident of \_\_\_\_\_,  
a \_\_\_\_\_

(Native born or naturalized; if the latter, furnish certificate.)

citizen of the United States, over 21 years of age, hereby applies, under the provisions of the act of October 20, 1914 (38 Stat., 741), for a mining lease of the certain leasing blocks, or tracts, of coal lands, to wit: Block \_\_, embracing the following specified legal subdivisions \_\_\_\_\_

aggregating \_\_\_\_\_ acres. If I secure said lease, I propose to invest not less than \_\_\_\_\_ dollars in active, productive mining operations conducted upon said lease; the active development will begin not later than \_\_\_\_\_. My experience in coal-mining operations is as follows: \_\_\_\_\_

I neither own nor hold any interest, either as a stockholder or otherwise, in any lease under this act, or in any application for such a lease, save and except the application now made; and I hereby refer to \_\_\_\_\_

as to my financial standing.

If I am awarded a lease, I will supply a satisfactory bond as required in section 9 of the regulations.

My post-office address is \_\_\_\_\_

(Signed) \_\_\_\_\_

Subscribed and sworn to before me, a \_\_\_\_\_,  
\_\_\_\_\_, on this \_\_\_\_\_ day of \_\_\_\_\_

[SEAL.]

## COAL-MINING PERMIT.

## REGULATIONS GOVERNING THE ISSUANCE OF PERMITS FOR THE FREE USE OF COAL IN THE UNRESERVED PUBLIC LANDS IN ALASKA.

Section 10 of the act of October 20, 1914 (38 Stat. 741), provides:

That in order to provide for the supply of strictly local and domestic needs for fuel the Secretary of the Interior may, under such rules and regulations as he may prescribe in advance, issue to any applicant qualified under section three of this act a limited license or permit granting the right to prospect for, mine, and dispose of coal belonging to the United States on specified tracts not to exceed ten acres to any one person or association of persons in any one coal field for a period not exceeding ten years, on such conditions not inconsistent with this act as in his opinion will safeguard the public interest without payment of royalty for the coal mined or for the land occupied: *Provided*, That the acquisition of holding of a lease under the preceding sections of this act shall be no bar to the acquisition, holding, or operating under the limited license in this section permitted. And the holding of such license shall be no bar to the acquisition or holding of such a lease or interest therein.

Owing to there being no settlements or local industries in or adjacent to the Bering or Matanuska coal fields, and the contemplated leasing offer of coal lands in said fields, these regulations and the permits provided for shall not at present apply to coal deposits in those fields.<sup>8</sup>

*Qualifications.*—Under the terms of the act, expressed in section 3 thereof, only citizens of the United States above the age of 21 years, associations of such citizens, corporations, and municipalities, organized under the laws of the United States or of any State or Territory thereof, provided the majority of the stock of such corporations shall at all times be owned and held by citizens of the United States, are eligible to receive a permit to prospect for and mine coal from the unreserved public lands in Alaska.

*Who may mine coal for sale.*—All permittees may mine coal for sale except railroads and common carriers, who by the terms of section 3 of the act are restricted to the acquirement of only such an amount of coal as may be required and used for their own consumption.

*Duration of permits.*—Permits will be granted for two years, beginning at date of filing, if filed in person or by attorney, or date of mailing, if sent by registered letter, subject to the approval of the Commissioner of the General Land Office, and upon application and satisfactory showing as to the necessity therefor, may be extended by the commissioner for a longer period, subject to such conditions necessary for the protection of the public interest as may be imposed prior to or at the time of the extension: Misrepresentation,

<sup>8</sup>In view of the fact that coal lands for leasing in Matanuska and Bering River fields have been surveyed into leasing blocks or tracts \* \* \* hereafter the restriction in the regulations should be construed as applying only to those lands included in such leasing blocks or tracts. (Circular of July 20, 1916.)

\* \* \* \* \*  
Since operations under the coal leasing provisions of the said act of October 20, 1914, are being extended, it now seems inadvisable to grant free mining permits in fields where mines are being operated under leases, since to do so would appear to be unfair to the lessee, who must, while burdened with more onerous requirements and with payment of royalties, compete with one holding a free permit. (Circular of March 24, 1922; 48 L. D. 597.)

carelessness, waste, injury to property, the charge of unreasonable prices for coal, or material violation of such rules and regulations governing operation as shall have been prescribed in advance of the issuance of a permit, will be deemed sufficient cause for revocation.

*Limitation of area.*—The act limits the area to be covered in any one permit to 10 acres. It is not to be inferred from this, however, that the permits granted thereunder shall necessarily cover that area. The ground covered by a permit must be square in form and should be limited to an area reasonably sufficient to supply the quantity of coal needed.

*Scope of permit.*—Permits issued under section 10 of the act of October 20, 1914, grant only a license to prospect for, mine, and remove coal free of charge from the unreserved public coal lands in Alaska, and do not authorize the mining of any other form of mineral deposit, nor the cutting or removal of timber.

*How to proceed to obtain a permit.*—The application should be duly executed on Form 4—020, and the same should either be transmitted by registered mail to, or filed in person with, the register and receiver of the United States land office of the district in which the land is situated. Prior to the execution of the application the applicant must have gone upon the land, plainly marked the boundaries thereof by substantial monuments, and posted a notice setting forth his intention of mining coal therefrom. The application must contain the statement that these requirements have been complied with and the description of the land as given in the application must correspond with the description as marked on the ground. The permit, if granted, should be recorded with the local mining district recorder, if the land is situated within an organized mining district.

*When coal may be mined before issuance of a permit.*—In view of the fact that by reason of long distances and limited means of transportation many applicants may be unable to appear in person at the United States land office to file their applications, it has been deemed advisable to allow such applicants the privilege of mining coal as soon as their applications have been duly executed and sent by registered mail to the proper United States land office. Should an application be rejected, upon receipt of notice thereof all privileges under this paragraph terminate and the applicant must cease mining the coal.

*Action by register.*—The register will keep a proper record of all applications received and all actions taken thereon in a book provided for that purpose. If there appear no reason why the application should not be allowed, the register will issue a permit on the form provided for that purpose. Should any objection appear either as to the qualifications of the applicant or applicants, or in the substance or sufficiency of the application, the register may reject the application or suspend it for correction or supplemental showing under the usual rules of procedure, subject to appeal to the Commissioner of the General Land Office. Upon the issuance of a permit the register will promptly forward to the Commissioner of the General Land Office, by special letter, the original application and a copy of the permit, and transmit copies thereof to the chief of

the Alaskan field division, and to the local representatives of the United States Bureau of Mines, for their information.<sup>9</sup>

**APPLICATION FOR COAL-MINING PERMIT.**

-----, 191  
*The Commissioner of the General Land Office,*  
*Washington, D. C.*

SIR: The undersigned, -----  
 (Name of applicant.)

of -----, hereby appl for a permit to  
 (Post-office address.)  
 prospect for, mine, and remove coal from the following-described  
 -----  
 (Describe the land by legal subdivision if surveyed, and by metes and bounds with refer-  
 -----  
 ence to some permanent natural landmark if unsurveyed.)

land: containing approximately ----- acres, situated within  
 the ----- land district, ----- miles ----- of -----  
 (Direction.)

Alaska, and in support of this application make the following repre-  
 sentation as to qualifications to receive a permit:  
 (Citizenship of applicant or

applicants must here be shown. If the applicant is a municipality or corporation, it must  
 -----  
 be shown under what laws it is organized; and if the latter, it must also be shown whether  
 -----  
 a majority of its stock is owned and held by citizens of the United States.)

The applicant further represent that ----- ha not,  
 (He, they or it.)  
 within two years last past, applied for or received a permit to mine  
 coal under the provisions of section 10 of the act of October 20, 1914,  
 in the coal field in which the land described in this application is  
 situated, -----  
 (State exceptions here, if any.)

and that the coal herein applied for is to be mined for the purpose of  
 supplying the following demands, for which approximately -----  
 tons are required annually:  
 (Here itemize the various uses to which the coal is

to be applied, stating the number of tons necessary for each use.)

It is further represented that the boundaries of the tract described  
 in this application have been plainly marked by substantial monu-  
 ments, and that a proper notice describing the land and showing the

<sup>9</sup> When there shall be filed in your office an application for free permit, or for re-  
 newal of an existing free permit under sec. 10 of the act of Oct. 14, 1914, involving land  
 within a field within which there are mines being operated under the leasing provisions  
 of the said act, the register shall transmit such application to the Commissioner of the  
 General Land Office without action, but with appropriate recommendation, calling special  
 attention to the possibility of its competition with existing Government leases.  
 Should there be applications for free permit in fields where there are no leases, such  
 permits may be issued by the register as heretofore. (As amended, Mar. 24, 1922; 48  
 L. D., 597.)

intention of the applicant to apply for a free permit to mine coal therefrom has been posted in a conspicuous place upon the land.

On consideration that a permit be granted, the applicants hereby agree :

1. To exercise reasonable diligence, precaution, and skill in the operation of the mine, with a view to the prevention of injury to workmen, waste of coal, damage to Government property, and to comply substantially with the instructions and the rules and regulations printed on the back of this application.

2. To charge only such prices for coal sold to others as represent a fair return for the labor expended and reasonable earning value to which the investment in the enterprise is entitled, without including any charge for the coal itself.

3. Not to mine or dispose of, either directly or indirectly, any coal from the area covered by said permit for export or any purpose other than "strictly local and domestic needs for fuel."

4. To leave the premises in good condition upon the termination of the permit, with all mine props and timbers in the mine intact, and with the underground workings free from refuse and in condition for continued mining operations.

Signature of applicant \_\_\_\_\_

The foregoing application was signed by \_\_\_\_\_

of \_\_\_\_\_, the applicant therein, in the presence of the undersigned, who, at \_\_\_\_\_ request and in \_\_\_\_\_

(His or their.)

(His or their.)

presence and in the presence of each other, have subscribed our names as witnesses to the execution thereof.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, at \_\_\_\_\_ Territory of Alaska.

Name \_\_\_\_\_

Residence \_\_\_\_\_

Name \_\_\_\_\_

Residence \_\_\_\_\_

#### THE NENANA FIELD.

A complete topographic and subdivisional township survey has been made of the Nenana field, and a folio containing photolithographic copies of the approved township plats of such surveys may be procured on application to the Superintendent of Documents, Washington, D. C., for \$1.

#### COAL PROSPECTING PERMITS.

As the act of October 20, 1914 (38 Stat. 741) (see p. 98), contained no provision for prospecting permits (which are to be distinguished from mining permits, see p. 121), it was, March 4, 1921, amended as follows (41 Stat. 1363), by adding to section 3—

*And provided further,* That where prospecting or exploratory work is necessary to determine the existence or workability of coal deposits in any unclaimed, undeveloped area in Alaska, the Secretary of the Interior may issue prospecting permits for a term of not to exceed four years, under such rules and regulations and conditions as to development as he may prescribe, to applicants qualified under this act, for not to exceed two thousand five hundred and sixty acres, and if within the time specified in said permit the permittee shows to the Secretary of the Interior that the land contains coal in commercial quantities, the permittee shall be entitled to a lease under this act for all or any part of the land in his permit.

March 30, 1921, the following regulations (Circular No. 744, 48 L. D. 50) were issued, relating to the act of March 4, 1921:

1. *Character of lands.*—Permits may be issued to prospect unclaimed, undeveloped areas in Alaska where prospecting or exploratory work is necessary to determine the existence or workability of the coal deposits.

2. *To whom permits may issue.*—Permits may be issued to any person above the age of 21 years who is a citizen of the United States, or to any association of such persons, or to any corporation or municipality organized under the laws of the United States or any State or Territory thereof, provided that a majority of the stock of such corporation shall at all times be owned and held by citizens of the United States.

3. *Area.*—Permits may be issued for tracts of not exceeding 2,560 acres of contiguous lands in reasonably compact form.

4. *Rights conferred.*—A permit will entitle the permittee to the exclusive right to prospect for coal on the land described therein. In the exercise of this right the permittee shall be authorized to remove from the premises only such coal as may be necessary in order to determine the workability and commercial value of the coal deposits in the land.

5. *Application for permit.*—Applications for permits shall be filed in the proper district land office, and after due notice thereof on the records, forwarded to the General Land Office with report of status of the land affected. No specific form of application is required and no blanks will be furnished, but it should cover in substance the following points:

(a) Applicant's name and address.

(b) Proof of citizenship, and qualification as to stock ownership if a corporation.

(c) Description of land for which a permit is desired, by legal subdivisions, if surveyed, and by metes and bounds and such other description as will identify the land, if unsurveyed. If unsurveyed, a survey sufficient to identify more fully and segregate the land may be required before permit is granted.

(d) Condition of coal occurrences, so far as determined, description of workings, and outcrops of coal beds, if any, and reason why the land is believed to offer a favorable field for prospecting for coal.

(e) Detailed plan and method of conducting prospecting or exploratory operations on the land, estimated cost of carrying out such proposed prospecting operations, and the diligence with which such operations will be prosecuted.

(f) A brief statement of applicant's experience in coal-mining operations, if any, together with one or more references as to his reputation and business standing.

The application must be under oath of the applicant or his attorney in fact, or, if a corporation, of one of its officers theretofore duly authorized.

6. *Form of permit.*—On receipt of the application, if found sufficient and the lands subject thereto, a permit will be issued, of which the district land office will be advised. Permits will be in substantially the following form:

U. S. Land Office at \_\_\_\_\_  
Serial No. \_\_\_\_\_

THE UNITED STATES OF AMERICA,  
DEPARTMENT OF THE INTERIOR.

COAL PROSPECTING PERMIT.

Know all men by these presents, That the Secretary of the Interior, under and by virtue of section 3, as amended March 4, 1921 (41 Stat. 1363), of the act of Congress entitled: "An act to provide for the leasing of coal lands in the Territory of Alaska, and for other purposes," approved October 20, 1914. (38 Stat. 741), has granted, and does hereby grant, a permit to \_\_\_\_\_, of the exclusive right for a period of four years from date hereof to prospect for coal the following described lands: \_\_\_\_\_, but for no other purpose, under the provisions of said act, and upon the following express conditions, to wit:

1. To begin prospecting work within 90 days from date hereof and to diligently prosecute the same during the period of such permit in accordance with the following plan \_\_\_\_\_

2. To remove from said premises only such coal or other material as may be necessary to prospecting work, and to keep a record of all coal mined and disposed of, payment of a royalty thereon of 10 cents per ton of 2,000 pounds to be made to the receiver of the district land office not later than during the calendar month succeeding that during which such coal was disposed of.

3. To afford all facilities for inspection of the prospecting work on behalf of the Secretary of the Interior, and to make report on demand of all matters pertaining to the character, progress, and results of such work.

4. To observe such conditions as to the use and occupancy of the surface of the land as provided by law, in case any of said lands may be entered or patented with a reservation of the coal deposits to the United States.

Expressly reserving to the Secretary of the Interior the right to permit for joint or several use such easements or rights of way upon, through, or in the land embraced herein as may be necessary or appropriate to the working of the same, or of other lands containing the deposits described in said act, and the treatment and shipment of the products thereof by or under authority of the Government, its lessees, or permittees, and for other public purposes; also reserving to the United States the right to lease, sell, or otherwise dispose of the surface of said lands under laws hereafter enacted in so far as said surface is not necessary for the use of the permittee in prospecting hereunder, and further reserving the right and authority to cancel this instrument for failure of the permittee to comply with any of the conditions hereof, after 30 days' notice of the reasons for such cancellation.

Valid existing rights acquired prior hereto on the lands described herein will not be adversely affected hereby.

Dated this \_\_\_\_\_ day of \_\_\_\_\_ 192\_\_\_\_\_.

\_\_\_\_\_  
*Secretary of the Interior.*

7. *Leases to permittees.*—A qualified permittee who has shown, within the period of the permit, that the land included therein contains coal in commercial quantities, will be entitled to a lease for such land, or part thereof as the permittee may desire, upon due application and publication of notice thereof. The application for lease should be filed in the proper district land office before expiration of the period of the permit. An application for lease under this section should describe the land desired, and set forth fully and in detail the extent and mode of occurrence of the coal deposits as disclosed by the prospecting work performed under the permit. Such leases will be granted, without competitive bidding, on rents and royalties to be fixed by the Secretary of the Interior, and otherwise substantially in the form of lease provided in regulations governing coal land leases in Alaska, approved May 18, 1916. (45 L. D., 113.)<sup>10</sup>

## AGRICULTURAL ENTRIES ON MINERAL LANDS.

By the act of March 8, 1922 (42 Stat. 415), provision was made for homestead entries on coal, oil, and gas lands in the Territory of Alaska. July 31, 1922, the following instructions (Circular No. 842, 49 L. D., 196) were issued under the act:

1. *Scope of the act.*—The act provides that, upon the unreserved, unwithdrawn public lands in the Territory of Alaska, homestead claims may be initiated by actual settlers on public lands which are known to contain workable coal, oil, or gas deposits, or which may be, in fact, valuable for the coal, oil, or gas contained therein. Thus, by the class last named, provision is made for cases in which land is not at the date of the initiation of the claim thereto actually known to contain workable coal, oil, or gas deposits, but in which it becomes known, during the interval between the initiation of the claim and its completion, that the land is, in fact, valuable for the coal, oil, or gas contained therein.

It also provides that homestead claims so initiated may be perfected under the appropriate public land laws and that, upon satisfactory proof of full compliance with these laws, the claimant shall be entitled to patent to the lands entered by him, which patent shall contain a reservation to the United States of all the coal, oil, or gas in the land patented, together with the right to prospect for, mine, and remove the same.

<sup>10</sup> See p. 98.

The act constitutes, therefore, an extension to the Territory of Alaska of the principles of the surface homestead acts already in force in the public-land States, namely, the acts of March 3, 1909 (35 Stat. 844), June 22, 1910 (36 Stat. 583), and July 17, 1914 (38 Stat. 509).

(2) *Homestead applications.*—Applications to make homestead entry for land embraced in a coal, oil, or gas prospecting permit or lease should be suspended and forwarded to the General Land Office for consideration and instructions.

Applications to make homestead entry for land classified as or known to be valuable for coal, oil, or gas, must have written, stamped, or printed upon their face the following:

“Application made in accordance with and subject to the provisions and reservations of the act of March 8, 1922 (42 Stat. 415).”

Like notations will be made by registers upon the face of the notices of allowance issued on applications filed under this act. If, prior to the date of the filing of the homestead application, the land was embraced in a prospecting permit or lease, the notice of allowance should contain substantially the following:

“The records of this office show that (*here insert the name of permittee or lessee*) has been granted a prospecting permit (*or lease, as the case may be*) affecting the (*here insert description of land*), and has the right to occupy so much of the surface thereof as may be required for all purposes reasonably incident to prospecting for and the removal of the coal (*or drilling for and the extraction of the oil and gas, as the case may be*), without liability to the homestead entryman for resulting damages to his crops and improvements.”

3. *Final certificates and patents.*—Final certificates issued to homestead claimants under this act will contain the following provision, which you will cause to be written or stamped thereon:

“Patent will contain provisions, reservations, conditions and limitations of the act of March 8, 1922 (42 Stat. 415).”

There will be incorporated in patents issued to homestead claimants under this act the following:

“Excepting and reserving, however, to the United States all the coal, oil, or gas in the lands so patented, and to it or persons authorized by it, the right to prospect for, mine, and remove such deposits from the same upon compliance with the conditions and subject to the provisions and limitations of the act of March 8, 1922 (42 Stat. 415).”

4. *Notations of records.*—Upon the acceptance by you of any filing under this act, you will make appropriate notation on your records to show that the filing was made under the provisions of the act. You will make a similar notation on the margin of the township plat, if any, giving the description of the land in which the deposits have been reserved.

5. *Soldiers' additional homesteads.*—The final proviso to the act excludes all the lands in Alaska withdrawn, classified or valuable for coal, oil, or gas; from entry or disposition by means of the location of rights under section 2306, Revised Statutes, commonly known as soldiers' additional homestead entries.

6. *Disposal of mineral deposits.*—Section 2 of the act provides that, upon satisfactory proof of full compliance with the provisions of the laws under which entry was made and with the provisions of the act itself, the homestead claimant shall be entitled to a patent to the land entered by him, which patent shall contain a reservation to the United States of all the coal, oil, and gas in the land so patented, together with the right to prospect for, mine, and remove the same; and that the coal, oil, and gas deposits so reserved shall be subject to disposal by the United States in accordance with the provisions of the laws applicable to coal, oil, or gas deposits, or coal, oil, or gas lands in Alaska, in force at the time of such disposal. It also provides that any person qualified to acquire coal, oil, or gas deposits, or the right to mine, and remove the coal, or to drill for, and remove the oil, or gas, under the laws of the United States, shall have the right at all times to enter upon the lands as provided by this act for the purpose of prospecting for coal, oil, or gas upon the approval, by the Secretary of the Interior, of a bond or undertaking to be filed with him as security for the payment of all the damages to the crops and improvements on such lands by reason of such prospecting; and that any person who has acquired from the United States coal, oil, or gas deposits in any such land or the right to mine, drill for, or remove the same, may reenter and occupy so much of the surface thereof as may be required for all purposes reasonably incident to the

mining and removal of the coal, oil, or gas therefrom, and mine, and remove the coal, or drill for, and remove the oil or gas upon payment of the damages caused thereby to the owner thereof, or upon giving a good and sufficient bond or undertaking, in an action instituted in any competent court to ascertain and fix the said damages.

There is no provision under the law for prospecting prior to the actual issuance of a permit therefor.

7. *Permittees' bonds.*—Provision is made by the act of March 4, 1921 (41 Stat. 1363), for coal prospecting permits in Alaska, and by the act of February 25, 1920 (41 Stat. 437), for oil prospecting permits. In order lawfully to mine, remove, or drill for the coal, oil, or gas affected by this act, the permittee must file a waiver from, or a consent of the homestead claimant, or there must be presented to and be approved by the Secretary of the Interior a bond or undertaking for the payment of all damages to the crops, and improvements on the lands prospected, caused by the prospecting.

8. *Form of permittee's bond.*—There must be filed with such bond or undertaking evidence of service of a copy thereof upon the homestead claimant. The bond must be executed by the prospector as principal with two competent individual sureties, or a corporate surety which has complied with the provisions of the act of August 13, 1894 (28 Stat. 279), as amended by the act of March 23, 1910 (36 Stat. 241), in the sum of \$1,000. Except in the case of a bond given by a qualified corporate surety there must be filed therewith affidavits of justification by the sureties and a certificate by a judge or clerk of a court of record, a United States district attorney, a United States commissioner, or a postmaster as to the identity, signatures, and financial competency of the sureties.

This bond or undertaking may be filed as a matter of expedition at the time of the filing by the mineral claimant of his application for a permit or the filing may be deferred until formal notice of the necessity therefor shall be received from this office. (Forms of bonds which should be utilized are appended.)

9. *Lessees' bonds.*—There is no provision for the presentation to this office of bonds executed to or for homestead claimants by lessees or by persons who have acquired from the United States coal, oil, or gas deposits or the right to mine, drill for, or remove the same. In such cases bonds are to be arranged for in an action instituted in any competent court to ascertain and fix the damages suffered.

10. *Homestead claimant's limited right to make use of the coal deposits.*—The homestead claimant under this act may, at any time prior to the disposal by the United States of the coal deposits on his claim, make use of them for his domestic purposes and this may be done without the filing of any application therefor. This privilege does not, however, authorize the mining of the coal deposits for the purpose of barter or sale.

11. *Supplementary circulars.*—The general regulations and procedure under the various classes of public land filings affected by this act are contained and may be referred to in the specific circulars relating to those filings.

[Public No. 165—42 Stat. 415.]

[H. R. 8842.]

AN ACT To provide for agricultural entries on coal lands in Alaska.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That from and after the passage of this act homestead claims may be initiated by actual settlers on public lands of the United States in Alaska known to contain workable coal, oil, or gas deposits, or that may be valuable for the coal, oil, or gas contained therein, and which are not otherwise reserved or withdrawn, whenever such claim shall be initiated with a view of obtaining or passing title with a reservation to the United States of the coal, oil, or gas in such lands, and of the right to prospect for, mine, and remove the same; and any settler who has initiated a homestead claim in good faith on lands containing workable deposits of coal, oil, or gas, or that may be valuable for the coal, oil, or gas contained therein, may perfect the same under the provisions of the laws under which the claim was initiated, but shall receive the limited patent provided for in this act: *Provided, however,* That should it be discovered at any time prior to the issuance of a final certificate on any claim initiated for unreserved lands in Alaska that the lands are coal, oil, or gas in character, the patent issued on such entry shall contain the reservation required by this act.

SEC. 2. That upon satisfactory proof of full compliance with the provisions of the laws under which the entry is made and of this act the entryman shall be entitled to a patent to the lands entered by him, which patent shall contain a reservation to the United States of all the coal, oil, or gas in the land so patented, together with the right to prospect for, mine, and remove the same. The coal, oil, or gas deposits so reserved shall be subject to disposal by the United States in accordance with the provisions of the laws applicable to coal, oil, or gas deposits or coal, oil, or gas lands in Alaska in force at the time of such disposal. Any person qualified to acquire coal, oil, or gas deposits, or the right to mine and remove the coal or to drill for and remove the oil or gas under the laws of the United States, shall have the right at all times to enter upon the lands entered or patented, as provided by the provisions of this act, for the purpose of prospecting for coal, oil, or gas therein, upon the approval by the Secretary of the Interior of a bond or undertaking to be filed with him as security for the payment of all damages to the crops and improvements on such lands by reason of such prospecting. Any person who has acquired from the United States the coal, oil, or gas deposits in any such land, or the right to mine, drill for, or remove the same, may reenter and occupy so much of the surface thereof as may be required for all purposes reasonably incident to the mining and removal of the coal, oil, or gas therefrom, and mine and remove the coal or drill for and remove the oil or gas upon payment of the damages caused thereby to the owner thereof, or upon giving a good and sufficient bond or undertaking in an action instituted in any competent court to ascertain and fix said damages: *Provided*, That the owner under such limited patent shall have the right to mine the coal for use on the land for domestic purposes at any time prior to the disposal by the United States of the coal deposits: *Provided further*, That nothing in this act shall be construed as authorizing the exploration upon or entry of any coal deposits withdrawn from such exploration and purchase: *And provided further*, That nothing herein contained shall be held or construed to authorize the entry or disposition, under section 2306, United States Revised Statutes, or under acts amendatory thereof or supplemental thereto, of withdrawn or classified coal, oil, or gas lands or of lands valuable for coal, oil, or gas.

Approved March 8, 1922.

*Coal Prospector's Bond.*

(Form approved July 31, 1922.)

(Under the acts of March 4, 1921 (41 Stat. 1363), and March 8, 1922 (42 Stat. 415).)

DEPARTMENT OF THE INTERIOR.

GENERAL LAND OFFICE.

Know all men by these presents: That I (or we), \_\_\_\_\_ of \_\_\_\_\_, a citizen (or citizens) of the United States, as principal (or principals), and \_\_\_\_\_ of \_\_\_\_\_ as surety (or sureties) are held and firmly bound unto the present surface owner or claimant of the hereinafter-described lands, his heirs, executors, administrators, and assigns, in the sum of one thousand dollars (\$1,000) lawful money of the United States, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, administrators, and assigns, and each and every one of us and them, jointly and severally, firmly by these presents.

Signed with our hands and sealed with our seals this \_\_\_\_\_ day of \_\_\_\_\_, 192\_\_.

The condition of this obligation is such that—

Whereas the principal (or principals) above named \_\_\_\_\_ is (or are) desirous of entering upon the following-described land, to wit: \_\_\_\_\_

in the \_\_\_\_\_ land district, \_\_\_\_\_ for the purpose of prospecting for coal thereon under the provisions of the acts of March 4, 1921 (41 Stat. 1363), and March 8, 1922 (42 Stat. 415); and

Whereas the said land has been disposed of, or is subject to disposition, with a reservation of the coal therein to the United States with the right to prospect for, mine, and remove the same, pursuant to the said act of March 4, 1921;

Now, therefore, if the said principal (or principals), surety (or sureties), or any of them, or their heirs, executors, administrators, or assigns, or any of them, upon demand, shall make good and sufficient recompense, satisfaction, and payment unto the lawful surface owner or claimant of said land, his heirs, executors, administrators, or assigns, for all damages to the crops and improvements on the said land as the said claimant, his heirs, executors, administrators, or assigns, shall suffer or sustain by reason of the said prospecting for coal on the said land, then this obligation shall be null and void; otherwise the same shall remain in full force and effect.

-----  
(Principal.)

-----  
(Residence.)

-----  
(Surety.)

-----  
(Residence.)

-----  
(Surety.)

-----  
(Residence.)

Signed and sealed in the presence of, and witnessed by, the undersigned:  
Witnesses—

Name-----

Residence-----

Name-----

Residence-----

Any erasure, insertion, or mutilation must be certified to as made before signing.

Approved and accepted-----, 192--

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*Secretary of the Interior.*

### *Oil Prospector's Bond.*

[Form approved July 31, 1922.]

(Under the act of February 25, 1920 (41 Stat. 437) and March 8, 1922 (42 Stat. 415).)

### DEPARTMENT OF THE INTERIOR.

#### GENERAL LAND OFFICE.

Know all men by these presents: That I (or we) ----- of -----, a citizen (or citizens) of the United States, as principal (or principals), and ----- of -----, as surety (or sureties), are held and firmly bound unto the United States, for the use and benefit of the United States, and of any entryman or owner of any of the herein-after-described lands, in the sum of one thousand dollars (\$1,000) lawful money of the United States, for the payment of which, well and truly to be made, we bind ourselves, our heirs, administrators, and assigns, and each and every one of us and them, jointly and severally, firmly by these presents.

Signed with our hands and sealed with our seals this ----- day of ----- 192--.

The condition of the obligation is such that—

Whereas the principal (or principals) above named ----- is (or are) desirous of entering upon the following-described land, to wit: -----

in the ----- land district, ----- for the purpose of prospecting for, drilling for and removing the oil and gas thereon under the provisions of the acts of February 25, 1920 (41 Stat. 437), and March 8, 1922 (42 Stat. 415), on condition that he or they shall (a) promptly repair, so far as possible, any damage to the oil strata or deposits resulting from improper methods of operation, and (b) reimburse any entryman or owner of any portion of the said lands heretofore entered with a reservation of the oil and gas deposits to the United States, made pursuant to the said act of March 8, 1922, for any

damage to the crops and improvements of such entryman or owner resulting from drilling or other prospecting operations, and

Whereas the said land has been disposed of, or is subject to disposition, with a reservation of the oil and gas therein to the United States with the right to prospect for, drill for, and remove the same, pursuant to the said act of March 8, 1922;

Now, therefore, if the said principal (or principals), surety (or sureties), or their heirs, executors, administrators, or assigns, or any of them, shall promptly and in all respects comply with the said conditions, then the above obligation shall be void and of no effect; otherwise the same shall remain in full force and effect.

-----  
(Principal.)  
-----  
(Residence.)  
-----  
(Surety.)  
-----  
(Residence.)  
-----  
(Surety.)  
-----  
(Residence.)

Signed and sealed in the presence of, and witnessed by, the undersigned;  
Witnesses:

Name-----

Residence-----

Name-----

Residence-----

Any erasure, insertion, or mutilation must be certified to as made before signing.

Approved and accepted-----, 192--

-----  
*Secretary of the Interior.*

#### ENTRIES ON LANDS VALUABLE FOR HYDROELECTRIC POWER PURPOSES.

Section 24 of the act of June 10, 1920 (41 Stat. 1063), reads as follows:

SEC. 24. That any lands of the United States included in any proposed project under the provisions of this act shall from the date of the filing of application therefore be reserved from entry, location, or other disposal under the laws of the United States until otherwise directed by the commission or by Congress. Notice that such application has been made, together with the date of filing thereof and a description of the lands of the United States affected thereby, shall be filed in the local land office for the district in which such lands are located. Whenever the commission shall determine that the value of any lands of the United States so applied for, or heretofore or hereafter reserved or classified as power sites, will not be injured or destroyed for the purpose of power development by location, entry, or selection under the public-land laws, the Secretary of the Interior, upon notice of such a determination, shall declare such lands open to location, entry, or selection, subject to and with a reservation of the right of the United States or its permittees or licensees to enter upon, occupy, and use any part or all of said lands necessary, in the judgment of the commission, for the purpose of this act, which right shall be expressly reserved in every patent issued for such lands; and no claim or right to compensation shall accrue from the occupation or use of any of said lands for said purposes. The United States or any licensee for any such lands hereunder may enter thereupon for the purposes of this act, upon payment of any damages to crops, buildings, or other improvements caused thereby to the owner thereof, or upon giving a good and sufficient bond to the United States for the use and benefit of the owner to secure the payment of such damages as may be determined and fixed in an action brought upon the bond in a court of competent jurisdiction, said bond to be in the form prescribed by the commission: *Provided*, That locations, entries, selections, or filings heretofore made for lands

reserved as water-power sites or in connection with water-power development or electrical transmission may proceed to approval or patent under and subject to the limitations and conditions in this section contained.

Action will be taken by the General Land Office on locations, entries, selections, and filings made prior to June 10, 1920, the date of the approval of the Federal water power act, in accordance with the proviso to said section 24.

Applications of any sort filed subsequent to June 10, 1920, looking toward the acquisition of title to public or reserved lands within or in conflict with power projects under this act, or which shall have been "reserved or classified as power sites," will be governed by the following rules:

1. Any application filed subsequent to June 10, 1920, which is wholly in conflict with lands reserved or classified as power sites, or covered by a power application under this act, will be rejected, subject to appeal, except—

(a) A homestead application predicated upon settlement prior to the reservation, classification, or filing of the power application, and accompanied by corroborated affidavit of such prior settlement, which will be considered on its merits.

(b) Any application which, were it not for the reservation, classification, or power application, would be allowable, wherein claim is made, by way of corroborated affidavit, that applicant has acquired equitable rights antedating the withdrawal. Such application will be considered on its merits.

2. Where any such application is only partially in conflict with lands reserved or classified as power sites, it will be allowed only as to the subdivisions not in conflict.

3. Where any application is presented which conflicts with a power transmission line withdrawal of a strip of land crossing the land applied for, it will, if otherwise regular, be allowed, but upon the face of the entry papers will be noted the following reservation:

Entry made subject to conditions and reservations of section 24, Federal water power act, approved June 10, 1920, in so far as transmission line withdrawal No. ———, created by Executive withdrawal of ——— (or water power application heretofore filed under the act of June 10, 1920), may affect same.

4. Whenever it is found necessary to reject an application, the applicant is at liberty to file an application for the restoration of such withdrawn lands, under the provisions of section 24 of the Federal water power act, but he will not thereby gain any preference right or right to preferential treatment if or when the lands are finally restored.

#### GENERAL.

Public lands withdrawn for power purposes are not subject to lease, or other disposition, other than such as is specifically recognized by the Federal water power act. There is no way to acquire preference rights, preferential treatment, or equitable or legal preference, excepting where legal or equitable rights were acquired before the withdrawal of the land, and, in all cases where such rights are claimed, careful investigation as to the bona fides of such claims will be made before they are recognized.

While the act of June 25, 1910 (36 Stat. 847), as amended allows metalliferous mineral explorations and applications based thereon, the act of June 10, 1920, makes no exceptions.

Therefore, any mineral application or location, based upon discoveries made subsequent to June 10, 1920, which is in conflict with lands reserved or classified as power sites, will be rejected subject to appeal.

If the application alleges discovery and location prior to the date of the act, it should be accompanied by corroborated affidavit, attesting the fact.

Applications for permit under the oil leasing act of February 25, 1920 (41 Stat. 437), embracing lands applied for under the Federal water power act, or reserved or classified as power sites, will be received and transmitted, as heretofore, to the General Land Office, where they will be considered on their merits.

Lands within final power permits under the act of February 15, 1901 (31 Stat. 790), or power transmission line permits or approved rights of way, whether under said act of February 15, 1901, or the act of March 4, 1911 (36 Stat. 1253), are deemed "classified as valuable for power purposes," and, whether withdrawn as power site reserves or not, occupy the status of withdrawn lands.

Further and more detailed information regarding any of the laws applicable to Alaska may be obtained upon application to the Commissioner of the General Land Office.

WILLIAM SPRY,  
*Commissioner.*

Approved:

HUBERT WORK,  
*Secretary.*

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#### FEES FOR CARBON COPIES OF TESTIMONY IN CONTEST CASES— INSTRUCTIONS OF MAY 28, 1910, 38 L. D., 615, MODIFIED.

##### INSTRUCTIONS.

[Circular No. 904.]

DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE,  
*Washington, D. C., September 10, 1923.*

#### REGISTERS AND RECEIVERS,

##### UNITED STATES LAND OFFICES:

When the reducing of testimony to writing in a contest case is done by regularly appointed employes of your office, carbon copies may be furnished at the rate of 5 cents per page, irrespective of the number of words or figures thereon.

If the testimony is reduced to writing by a clerk employed under authority of the circular of February 15, 1909 (37 L. D., 448), such clerk will be allowed to make a charge of not exceeding 3 cents per

hundred words for carbon copies, to be collected by him from the party to whom the same is furnished.

WILLIAM SPRY,  
*Commissioner.*

Approved:

E. C. FINNEY,  
*First Assistant Secretary.*

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**MILLER v. LITTLE.**

*Decided September 11, 1923.*

**OIL AND GAS LANDS—PROSPECTING PERMIT—HOMESTEAD ENTRY—PREFERENCE RIGHT—CONTEST.**

The preferment in the award of an oil and gas prospecting permit accorded to a homestead entryman by section 20 of the act of February 25, 1920, over a prior applicant for a permit under section 13 of that act, is not affected by a pending contest against the entry where there is no charge that the entry was made with a view to acquiring the mineral deposits or in bad faith for any other purpose.

*FINNEY, First Assistant Secretary:*

This is an appeal by Charles M. Miller from the decision of the Commissioner of the General Land Office, dated June 14, 1923, rejecting his application, filed on March 16, 1922, under section 13 of the leasing act of February 25, 1920 (41 Stat., 437), as to S.  $\frac{1}{2}$  SW.  $\frac{1}{4}$ , Sec. 14, E.  $\frac{1}{2}$  SE.  $\frac{1}{4}$ , Sec. 15, N.  $\frac{1}{2}$  NW.  $\frac{1}{4}$ , Sec. 23, T. 35 N., R. 1 W., M. M., Great Falls, Montana, land district, because in conflict with a preference right application filed by Louis E. Little, under section 20 of said act, on March 1, 1923.

Little made homestead entry for the above described land on March 20, 1919, and on April 4, 1923, filed consent to the amendment of said entry so as to reserve the oil and gas deposits to the United States, pursuant to the act of July 17, 1914 (38 Stat., 509). This amendment was required by the Commissioner, on March 19, 1923, pursuant to section 12(c) of the leasing regulations approved March 11, 1920 (47 L. D., 437). Prior thereto, on March 1, 1923, Little had filed his application for a preference right permit.

Miller points out in his appeal that application to contest Little's entry was filed on February 19, 1923, by one Harry Miller, on a charge that the entryman had failed to establish residence upon the land, or to make any improvements thereon, and that the entry had been abandoned since April, 1919. He alleges that contest was allowed, a hearing had, and that said proceeding awaits decision by the local officers, and submits that adjudication of the conflicting permit applications should be suspended until a final decision

is rendered on the contest, as the charge made, if substantiated, would determine that the entry was not made in good faith, and was not, therefore, proper grounds upon which a preference right to a permit could be awarded to Little.

The question to be determined is, therefore, whether a pending contest of a homestead is sufficient to prevent the issuance of a permit to prospect for oil and gas, under section 20 of the leasing act, to the contestee, in preferment to a prior applicant for prospecting permit, filed pursuant to section 13 of said act.

There is no allegation that the homestead entry was made with a view to acquiring the mineral deposits or that it was made in bad faith for any other purpose. The charge made is that the entry was not maintained in accordance with the law under which it was initiated. There is no express provision in section 20 of the leasing act, which requires that an entry be *maintained* according to the law under which it was made as a condition precedent to a preference right, the only requirement being that the entry be *made* in good faith. The entry was uncanceled when the waiver was filed and the land thereupon became subject to disposal under section 20 of the leasing act.

The decision of the Commissioner is therefore affirmed.

#### EFFECT OF WITHDRAWAL OF ALLOWABLE APPLICATION TO MAKE DESERT-LAND ENTRY.

##### INSTRUCTIONS. *See Page 184*

DEPARTMENT OF THE INTERIOR,  
Washington, D. C., September 13, 1923.

##### THE COMMISSIONER OF THE GENERAL LAND OFFICE:

It appears from data submitted by you that in at least one land district certain persons are segregating public land by the filing of applications to make desert-land entries, and later withdrawing the applications when purchasers for the "relinquishments" are found. With a view to putting an end to such practices, the following administrative rule is adopted:

An allowable application to make desert-land entry will be treated as an entry within the meaning of the act of September 5, 1914 (38 Stat., 712), and if such an application is withdrawn prior to its allowance the applicant will be required, in connection with any subsequent application, to make the showing required of persons who seek to make second desert-land entries.

E. C. FINNEY,  
First Assistant Secretary.

*See Land Service Bulletin for  
February 1924.*

## HARVARD v. FLEMMINGS.

*Decided September 13, 1923.*

## STOCK-RAISING HOMESTEAD—ADVERSE CLAIM—IMPROVEMENTS—HEARING—PRACTICE.

While ordinarily the Department will not inquire whether an applicant under section 4 of the stock-raising homestead act has complied with the law in connection with his original entry, yet an exception will be made in favor of a conflicting applicant who has placed valuable improvements upon the land and made allegations which, if sustained at the hearing, warrant cancellation thereof.

FINNEY, *First Assistant Secretary*:

Frank E. Harvard has appealed from a decision of the Commissioner of the General Land Office dated April 24, 1923, holding for cancellation as to N.  $\frac{1}{2}$  S.  $\frac{1}{2}$ , Sec. 26, and NE.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , Sec. 27, his entry under section 1 of the stock-raising homestead act embracing (as amended) SE.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , W.  $\frac{1}{2}$  SW.  $\frac{1}{4}$ , Sec. 25, S.  $\frac{1}{2}$ , Sec. 26, SE.  $\frac{1}{4}$ , Sec. 27, and NE.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ , Sec. 34, T. 45 N., R. 86 W., 6th P. M., Buffalo, Wyoming, land district.

Harvard's application to make said entry was filed July 26, 1920. It was allowed June 6, 1921, and was held for cancellation to the extent stated for conflict with the application of James Flemmings, filed December 6, 1919, to make entry under section 4 of the stock-raising homestead act for S.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , SE.  $\frac{1}{4}$  NW.  $\frac{1}{4}$ , N.  $\frac{1}{2}$  S.  $\frac{1}{2}$ , Sec. 26, and NE.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , Sec. 27, said township, as additional to his entry under section 2289, Revised Statutes, made October 10, 1919, for SW.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , Sec. 23, NW.  $\frac{1}{4}$  NW.  $\frac{1}{4}$ , Sec. 26, and N.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , Sec. 27, said township, and his entry under section 3 of the enlarged homestead act, applied for December 6, 1919, and allowed January 10, 1922, for SE.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , Sec. 23, NE.  $\frac{1}{4}$  NW.  $\frac{1}{4}$ , Sec. 26, and S.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , Sec. 27, said township.

Flemmings's application under the stock-raising homestead act was not noted on the records of the local office when filed, and Harvard's entry was allowed in ignorance of the pendency of that application.

Harvard contends, and his allegations are corroborated, that Flemmings left the State of Wyoming in the spring of 1920, and that he never established residence on the land entered by him.

Ordinarily, the Department will not inquire whether an applicant under section 4 of the stock-raising homestead act has complied with the law in connection with his original entry, but Harvard having made improvements on the land entered by him, and having made allegations which, if sustained at a hearing, would warrant the cancellation of Flemmings's entries, leaving him without any basis for an additional entry under section 4 of the stock-raising homestead act, Harvard's entry will not be canceled at this time, but Flemmings

will be required to show cause, if any there be, within thirty days from notice, why his pending application should not be rejected. After the expiration of the time allowed Flemmings, the matter will be further considered.

### GRAY v. YIRKA.

*See Page 613*

*Decided September 27, 1923.*

#### STOCK RAISING HOMESTEAD—ADDITIONAL—IMPROVEMENTS—FINAL PROOF—CONTEST.

Where an additional entry, made under the stock-raising homestead act of December 29, 1916, is governed by the provisions of section 4 thereof, and acceptable final proof has been submitted on the original entry, the entryman will only be required to show at time of submission of final proof on the additional entry the presence of permanent improvements, tending to increase the value of the land for stock-raising purposes, of the value of not less than \$1.25 per acre.

GOODWIN, *Assistant Secretary*:

Ernest Gray has appealed from a decision of the Commissioner of the General Land Office dated January 25, 1922, dismissing his contest against John Yirka's additional entry under the stock-raising homestead act, embracing E.  $\frac{1}{2}$  SW.  $\frac{1}{4}$ , W.  $\frac{1}{2}$  SE.  $\frac{1}{4}$ , Sec. 30, E.  $\frac{1}{2}$  NW.  $\frac{1}{4}$ , W.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , Sec. 31, T. 3 S., R. 12 E., B. H. M., Rapid City, South Dakota, land district.

Application to make the entry in question was filed April 14, 1919. The entry was allowed April 19, 1920. Gray's contest was initiated February 9, 1921, it being charged that—

claimant has never resided upon his original entry and was not residing thereon at the time the entry herein was filed or allowed, but for about four years last past has lived at Murdo, South Dakota, where he resides and runs a butcher shop; that said lands adjoin claimant's original entry; that claimant has never established residence on said additional entry nor improved the same, nor has he ever reestablished residence on his original entry, but has wholly abandoned his additional entry since the date thereof, and that such abandonment is not due to his employment in the Army, Navy, or Marine Corps of the United States.

Entryman's answer, filed March 9, 1921, admitted that he had never resided on the land involved, denied that he had abandoned the land, denied that he had never resided upon his original entry, denied that he was not residing thereon at the time he applied to make the entry in question, and denied that for four years last past he had lived at Murdo, South Dakota.

A hearing was had before the local officers, who by decision dated April 21, 1921, recommended the cancellation of the entry, finding from the testimony of three witnesses produced by contestant that entryman had not lived upon his original entry since about the first of the year 1918, was not living there at the time he had applied to

enter the land involved, was not living there when the entry was allowed, and was not living there at the time of final proof on his original entry.

Yirka's original entry, under section 2289, Revised Statutes, for S.  $\frac{1}{2}$  SE.  $\frac{1}{4}$ , SE.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , Sec. 19, and NE.  $\frac{1}{4}$  NW.  $\frac{1}{4}$ , Sec. 30, said township, was made May 12, 1913. On September 12, 1916, Yirka applied to make an additional entry under section 3 of the enlarged homestead act for SE.  $\frac{1}{4}$  NW.  $\frac{1}{4}$ , N.  $\frac{1}{2}$  NE.  $\frac{1}{4}$  and SW.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ , Sec. 30, said township. The application was allowed March 12, 1919. Final proof on the combined entries was submitted January 15, 1920. Final certificate issued April 5, 1920, followed by patent on August 2, 1920.

Yirka was allowed seven years from the date of his original entry—May 12, 1913—within which to submit final proof on his combined original and first additional entries. Such proof had not been submitted at the date he applied to make the entry in question, hence the entry is governed by the provisions of section 4 of the stock-raising homestead act, as amended by the act of September 29, 1919 (41 Stat., 287)—

That any homestead entryman of lands of the character herein described who has not submitted final proof upon his existing entry shall have the right to enter, subject to the provisions of this Act, such amount of lands designated for entry under the provisions of this Act, within a radius of twenty miles from said existing entry, as shall not, together with the amount embraced in his original entry, exceed six hundred and forty acres, and residence upon the original entry shall be credited on both entries, but improvements must be made on the additional entry equal to \$1.25 for each acre thereof: *Provided*, That the entryman shall be required to enter all contiguous areas of the character herein described open to entry prior to the entry of any noncontiguous land.

Before Gray's contest was initiated, all questions relative to the sufficiency of the final proof on the original entry were closed, so far as Gray is concerned. It was improper to allow any proceeding which required Yirka, after the issuance of patent, to defend such final proof. The contest affidavit should have been rejected as not stating a cause of action. However, after entryman had joined issue, his objection to the introduction of testimony, made at the hearing, came too late.

All the facts found by the local officers to have been established at the hearing could have been admitted by entryman, and yet would not have formed a proper basis for the cancellation of the entry. The mere fact that final proof on the original entry had not been submitted when the application to make the entry in question was filed qualified Yirka to make the entry, and upon the acceptance of final three-year proof on the original entry Yirka was relieved of any further showing as to residence.

The correct practice may be stated as follows: Where a person's additional entry is governed by the provisions of section 4 of the stock-raising homestead act, and acceptable final proof has been submitted on the original entry, the entryman will only be required to show on final proof the presence of permanent improvements upon the land entered, tending to increase the value of the same for stock-raising purposes, of the value of not less than \$1.25 per acre.

It is considered proper to note that because of appellant's contentions relative to the final proof on the original entry, the Department ordered a field investigation. A special agent reported in detail and exhaustively the result of his investigation and of his interviews with various witnesses. His report was accompanied by the affidavits of seven persons, all of whom, with one exception, alleged compliance with the law by Yirka. The statements of other parties who did not make affidavits were related by the agent, who recommended that the case be closed without any further proceedings. The recommendation was approved by the chief of field division and adopted by the Commissioner of the General Land Office.

The dismissal of the contest is affirmed.

### **RUPLE v. DE JOURNETTE (ON REHEARING).**

*Decided September 28, 1923.*

#### **DESERT LAND—ASSIGNMENT—ACT OF MARCH 28, 1908.**

An assignment of a desert-land entry to one who is qualified to make an entry of that character is not rendered invalid or ineffective because he holds under a transfer from a mesne assignor who is not so qualified notwithstanding that section 2 of the act of March 28, 1908, declares that assignments to disqualified persons and to associations shall not be allowed or recognized.

#### **DESERT LAND—ASSIGNMENT—WORDS AND PHRASES.**

The term "association" usually means an unincorporated organization composed of a body of persons, banded together for some particular purpose, partaking in its general form and mode of procedure of the characteristics of a corporation.

#### **DESERT LAND—ASSIGNMENT—ACT OF MARCH 28, 1908.**

Where a desert land entry is assigned to several individuals, and there is no evidence to show that the assignees have formed a union or organization for the prosecution of some enterprise, such transfer is not to be construed as an assignment to an association within the prohibition of section 2 of the act of March 28, 1908.

*GOODWIN, Assistant Secretary:*

On September 12, 1906, the General Land Office in effect, accepted the final proof made by May Ruple under her desert-land entry, Salt Lake City 4960, now serialized as Vernal 02319, made in 1902

for unsurveyed lands which were described as lots 1, 2, 5, 6, and 9, Sec. 1, T. 4 S., R. 24 E., S. L. M., on the plat thereof later filed.

In 1910 the entrywoman sold, assigned and quit-claimed the entry to Patrick J. Whelan, Jacob Hay and Walter Hanks for \$2000; and later Whelan conveyed "his undivided one-third interest" in the desert-land entry to Augustine Kendall who in turn made a similar conveyance to Thomas Ford De Journette, to whom Hanks and Hay also conveyed their interests under the entry.

After the filing of the township plat, De Journette filed an application for the adjustment of the entry, and asked that he be recognized as the present assignee thereof and receive final certificate and patent. On August 8, 1919, one Lilly Ruple filed a protest against allowance of that application. The protest was rejected by the General Land Office decision of June 13, 1921, which adjusted the entry. That decision was affirmed by the departmental decision of January 16, 1922, containing the statement that—

It is urged that the intermediate assignees of May Ruple's interest were not qualified to make desert-land entry nor qualified as assignees of a desert-land entry; May Ruple's interest was assigned after proof. It has not been determined that the intermediate assignees were not qualified, nor is it controlling in this case. There is no fault found with the qualifications of the present holder and claimant, and the intermediate assignees were sufficient as channels through which the entrywoman's interest passed to DeJournette. (See 42 L. D., 90.)

That decision was adhered to in the denial of a motion for a rehearing on October 9, 1922, and on December 8, 1922, Lilly Ruple filed a further protest charging that DeJournette was not qualified to take an assignment of the entry because he had already entered other lands under the desert-land laws.

On February 21, 1923, DeJournette filed evidence intended to show that he is qualified to make a second desert entry and by its decision of April 25, 1923, the General Land Office found that he was qualified as such and recognized him as a proper assignee under the May Ruple entry here in question.

In appealing from that decision, counsel for Lilly Ruple made strenuous contentions in his 24 assignments of error in which he urged, in effect, that May Ruple's assignment to Whelan, Hanks and Hay was an attempted transfer to an "association" such as is prescribed by section 2, act March 28, 1908 (35 Stat., 52), which declares that assignments of desert entries to persons who are not qualified to make such entries, or "to or for the benefit of any corporation or association shall not be authorized or recognized."

In declining to sustain that appeal and affirming the General Land Office decision, this Department said in its decision of August 16, 1923, that it—

has not determined whether or not Whelan, Hay, and Hanks were an association, or whether they were qualified to take the entry as assignees. The Department need not determine those facts at this time, and will not make inquiry into it since it is not necessary to a disposition of the case. The determination of those facts is not now before the Department and is not properly in issue. The question now before the Department relates only to the present claimant who claims to be the qualified assignee and seeks recognition as such.

The intermediate assignments are only noted in order to determine whether or not the present claimant is shown to be the successor in interest to the entry. The intermediate assignees need not be authorized to have held the assignment, or be recognized by the Department. No inquiry is made into their qualifications. The Department adheres to the doctrine explained in the case of *Augusta Ernst* (42 L. D., 90).

In his motion for a rehearing now up for consideration, counsel for protestant makes five suggestions of error, only two of which have any merit worthy of consideration, and they are to the effect (1) that De Journette should not have been recognized as an assignee because the entrywoman's transfer was made to an association composed of Whelan, Hay and Hanks, and (2) that the several conveyances mentioned passed an interest in the land itself, and were "not an assignment of the entry."

This last contention is not only immaterial and purely technical, but it is not supported by the facts of record, because the quitclaim deed executed by the entrywoman expressly declares that she conveyed "the following described Desert Land Entry No. 4960 made June 12, 1902, for the unsurveyed" land mentioned therein, and her grantees used practically the same language in this individual and similar deed to De Journette, in which they each conveyed "an undivided one third interest in the Desert Land Entry No. 4960" etc.

The other contention might very well be ignored because it was emphatically raised in the appeal from the General Land Office decision and considered at the time the departmental decision now complained of was prepared (*Cobb v. Crowther et al.*, on rehearing, 46 L. D., 473); but aside from that consideration there are two reasons why that contention cannot be sustained.

If it be conceded that the entrywoman's transferees must be considered as an "association" that fact would not call for a denial of De Journette's claim under this entry, for the reason that it is well settled that an assignment of a desert-land entry to one who is qualified to make an entry of that kind is not rendered invalid or ineffective because he holds under a transfer from a mesne assignor who is not so qualified, and the statute on which this contention is based declares with equal positiveness that assignments to both disqualified persons and to associations shall not "be allowed or recognized."

But it can not be held under the facts in this case, that Whelan, Hay and Hanks constituted an "association" such as is mentioned in that statute.

In Webster's Universal Dictionary the word is defined as a "union of persons in a company or society for some particular purpose."

"In the United States this term is used to signify a body of persons united without a charter; but upon methods and forms used by incorporated bodies for the prosecution of some enterprise." 1 Bouvier's Law Dictionary, 183.

"The term 'association' usually means an unincorporated organization composed of a body of men, partaking in its general form and mode of procedure of the characteristics of a corporation." Pratt v. Roman Catholic Orphan Asylum (46 N. Y., Supp. 1035; 1 Words & Phrases, old series, 584).

And in United States v. Trinidad Coal and Coking Company (137 U. S., 160), it was held that a corporation was an "association of persons" such as is mentioned in the coal-land laws.

In the present case there does not appear to have been any union or organization formed or existing between the entrywoman's assignees "for the prosecution of some enterprise," and the most that can be said is that they were merely joined by her as assignees of her equitable interest under her completed entry under which nothing remained to be done by them save the mere acts of showing their individual qualifications and asking the adjustment of the entry to the survey; and there was no relationship between them except that they each took an undivided one-third interest under the assignment, and later conveyed that interest to De Journette by their individual and not by their joint deeds.

There is an intimation in the motion for rehearing that "De Journette is a 'dummy' for Augustine Kendall, Walter Hanks and Park Live Stock Company" and is seeking title in their interests, but in view of the fact that no properly preferred charge of that kind is before this Department, that intimation will be disregarded.

For the reasons given the motion for rehearing is hereby denied.

*Note by electors of District - see 53 240 334*

#### CONSTRUCTION OF THE RECLAMATION LAWS RELATING TO CONTRACTS BETWEEN THE BUREAU OF RECLAMATION AND IRRIGATION DISTRICTS.

*Opinion, September 29, 1923.*

RECLAMATION—IRRIGATION—WATER RIGHT—PAYMENT—ACTS OF FEBRUARY 21, 1911, AND MAY 15, 1922.

The act of May 15, 1922, which authorized the Secretary of the Interior to enter into contracts with irrigation districts with respect to payments of water users' charges, did not modify the act of February 21, 1911, and

*See Page 223*

existing contracts entered into under the latter act may stand as made or be modified under the same authority which authorized their execution; likewise, new contracts may be made thereunder without resort to the court proceedings specified for contracts under the former act.

RECLAMATION—IRRIGATION—WATER RIGHT—ACT OF MAY 15, 1922.

The act of May 15, 1922, has no retroactive effect upon contracts theretofore made under proper authority and such contracts are not, therefore, dependent for their validity upon the court confirmation specified in the proviso to that act.

RECLAMATION—IRRIGATION—WATER RIGHT—PAYMENT—SECRETARY OF THE INTERIOR—ACT OF AUGUST 13, 1914.

The Secretary of the Interior, in whom the extension act of August 13, 1914, imposed the authority to fix the date for payment of operation and maintenance charges in connection with irrigation projects as of the date fixed for each project, may for sufficient reason change the due date for future payments and modify the contract without violation of either the letter or the spirit of the act of May 15, 1922, and without invoking the procedure therein provided for confirmation of contracts under the latter act.

RECLAMATION—IRRIGATION—WATER RIGHT—PAYMENT.

The act of August 13, 1914, provided for the payment of irrigation construction charges upon a specified date, the only authority for change of which is contained in the act of May 15, 1922, and where the latter act is invoked to change the date of payment under a prior contract, the procedure prescribed therein must be followed in order to give validity to the amended contract.

EDWARDS, *Solicitor*:

By letter of September 8, 1923, the Commissioner of Reclamation requested instructions in respect to certain questions under the reclamation laws in connection with contracts between the Bureau of Reclamation and irrigation districts.

The act of February 21, 1911 (36 stat., 925), known as the Warren act, authorizes the Secretary of the Interior to sell surplus water from irrigation projects to individuals, corporations, associations, and irrigation districts engaged in the distribution of water for irrigation.

Section 5 of the extension act of August 13, 1914 (38 Stat., 686), contains the following:

Whenever any legally organized water users' association or irrigation district shall so request, the Secretary of the Interior is hereby authorized, in his discretion, to transfer to such water users' association or irrigation district the care, operation, and maintenance of all or any part of the project works, subject to such rules and regulations as he may prescribe.

The act last mentioned also provided that instalment payments for cost of construction should be made on December 1 annually, and that the yearly payments for operation and maintenance charges should be payable on the date fixed for each project by the Secre-

*As to release of liens  
see 49210604*

tary of the Interior. It also provided certain penalties for failure to make payment on the due dates.

Section 1 of the act of May 15, 1922 (42 Stat., 541), reads as follows:

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in carrying out the purposes of the Act of June 17, 1902 (Thirty-second Statutes, page 388), and Acts amendatory thereof and supplementary thereto, and known as and called the reclamation law, the Secretary of the Interior may enter into contract with any legally organized irrigation district whereby such irrigation district shall agree to pay the moneys required to be paid to the United States, and in such event water-right applications on the part of landowners and entrymen, in the discretion of the Secretary of the Interior, may be dispensed with. In the event of such contract being made with an irrigation district, the Secretary of the Interior, in his discretion, may contract that the payments, both for the construction of irrigation works and for operation and maintenance, on the part of the district shall be made upon such dates as will best conform to the district and taxation laws of the respective States under which such irrigation districts shall be formed, and if he deem it advisable he may contract for such penalties or interest charges in case of delinquency in payments as he may deem proper and consistent with such State laws, notwithstanding the provisions of sections 1, 2, 3, 5, and 6 of the Reclamation Extension Act approved August 13, 1914 (Thirty-eight Statutes, page 686). The Secretary of the Interior may accept a partial payment of the amount due from any district to the United States, providing such acceptance shall not constitute a waiver of the balance remaining due nor the interest or penalties, if any, accruing upon said balance: *Provided*, That no contract with an irrigation district under this Act shall be binding on the United States until the proceedings on the part of the district for the authorization of the execution of the contract with the United States shall have been confirmed by decree of a court of competent jurisdiction, or pending appellate action if ground for appeal be laid.*

The questions presented are summarized as follows:

(a) Is section 1 of the act of May 15, 1922, applicable to contracts under the Warren act which provide merely for the sale of surplus water in bulk at a stated price for use on lands outside our projects?

(b) Is this section retroactive in its operation? And may the due dates in contracts made with irrigation districts prior to May 15, 1922, be now changed thereunder?

(c) Does the section in question authorize extensions in dates of payment already fixed?

(d) If the section applies to a contract executed before May 15, 1922, and not confirmed by court decree, and a new contract were made changing due dates, would the irrigation district be required to secure a court decree of confirmation covering the execution both of the old contract and of the new contract?

I find nothing in the act of May 15, 1922, to modify the prior act of February 21, 1911. The latter act serves a different purpose. It is designed to permit surplus waters of a Government reclamation

project to be sold and used for irrigation of lands outside the project upon such terms as the Secretary may deem just and equitable. Existing contracts under that act may stand as made or be modified under the same authority which authorized their execution. Likewise, new contracts may be made under that act without the proceeding specified for contracts under the later act of May 15, 1922.

I do not believe that the later act is retroactive in the sense that contracts theretofore made under proper authority must now depend upon court confirmation under that act for their validity. They may stand as made if satisfactory or they may be changed without invoking the act of 1922 in any particular so far as authorized by other law not inconsistent with said act.

As above mentioned, the extension act of 1914 provided that operation and maintenance charges should be payable on the date fixed for each project. Having the power to fix the date of this class of charges and to contract with an irrigation district for their collection, I think the Secretary may for sufficient reason change such due date for future payments and modify the contract without violation of either the letter or spirit of the act of 1922 and without invoking the procedure therein provided for contracts under that act. It is different in regard to the construction charges which were fixed by the act of 1914 as payable on December 1. The only authority for change of the date for that class of payments, so far as observed, is contained in the act of 1922, and if that act be invoked to change a prior contract, the process prescribed therein must be followed to give validity to the amended contract.

There can be no reasonable doubt that the later act may be applied so as to change the date of future payments theretofore fixed. It may be either advanced or retarded, and any confirmation by the court should cover the whole arrangement, whether it be a new contract or a modification of the old one.

It does not appear to me that the act of May 15, 1922, was intended to provide a method for adjustment of past delinquencies in payments. The act of March 31, 1922 (42 Stat., 489), as amended and enlarged by the act of February 28, 1923 (42 Stat., 1324), authorizes extension of time to individual water users or a legally organized group of water users, and the terms of that legislation should be applied in all cases of extension of time for payments already due.

Approved:

HUBERT WORK,  
*Secretary.*

**NORTHERN PACIFIC RAILWAY COMPANY.**

*Decided October 11, 1923.*

**SELECTION—COAL LANDS—WITHDRAWAL—SURFACE RIGHTS.**

A coal land withdrawal does not defeat a selection made by the Northern Pacific Railway Company pursuant to section 3 of the act of March 2, 1899, which authorized the exchange of its lands within the Mount Rainier National Park for unreserved, unappropriated, nonmineral lands elsewhere, where the company elects to take subject to the provisions of the act of March 3, 1909, and the lands are nonmineral in character except as to their coal contents.

*FINNEY, First Assistant Secretary:*

November 23, 1905, the Northern Pacific Railway Company filed selection 81, Miles City, under the act of March 2, 1899 (30 Stat., 993), including land then unsurveyed, described by metes and bounds, which was expected to and on official survey did become SW.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , Sec. 34, T. 3 N., R. 38 E., now in the Billings, Montana, land district. The official survey of the land was made in August, 1909, and the plat of survey was approved December 20, 1910. The company filed a new description May 8, 1912, adjusting the selection to the official survey. The land was withdrawn from coal filing or entry April 20, 1910, and by Executive order of July 9, 1910, it was included in Montana withdrawal No. 1. June 14, 1923, in compliance with requirement made by the General Land Office, the company filed a coal waiver under the act of March 3, 1909 (35 Stat., 844). The surveyor did not classify the land as nonmineral at the time of the official survey in August, 1909, but he stated in his field notes that "coal and iron were found in every section of the township." The tract here involved was reported by a field agent of the General Land Office December 17, 1917, and by the Geological Survey May 3, 1918, as being nonmineral except as to the coal.

On the facts stated, the Commissioner of the General Land Office in decision dated July 11, 1923, held the selection for cancellation as not coming within the specific provisions of section 3 of the act of March 2, 1899, that the company might select "an equal quantity of nonmineral public lands so classified as nonmineral at the time of actual Government survey."

In support of the company's appeal from the Commissioner's decision, counsel stresses the fact that the land had been reported by the Geological Survey and the field agent of the General Land Office as being nonmineral other than coal; that the company's selection was made in good faith while the land was unsurveyed, as is permitted under the act of March 2, 1899; and that the selection has been long recognized by the General Land Office which required and has received the company's coal waiver under the act of March 3, 1909. It

is also contended that the Commissioner's decision paid no regard to the act of March 3, 1909, under which the company was called upon to elect and did elect to accept a limited patent; that the case of Northern Pacific Railway Company (40 L. D., 64), cited by the Commissioner, did not cover a selection falling within the purview of the act of March 3, 1909.

In instructions dated May 10, 1923 (49 L. D., 587), interpreting the act of July 1, 1898 (30 Stat., 597, 620), as applied to *Quinn v. Northern Pacific Railway Company*, decided October 17, 1922, it was said:

In the case of *Quinn v. Northern Pacific Railway Company*, the Department, in its said decision of October 17, 1922, passed upon a selection under the act of July 1, 1898, *supra*, as to which the acts making the railroad grant were pertinent in a historical sense only, as the source of the company's title or claim of right to land relinquished by it under the direction of the Secretary of the Interior. The act of July 1, 1898, as to selections, made whether by the company or by settlers, is clearly one of the many laws enacted by Congress to remedy hardship or to advance some public interest, real or supposed, by granting what are popularly denominated lieu or scrip rights. Each of these acts has been interpreted and administered in the light of its own provisions, and there is nothing in the act of July 1, 1898, *supra*, that induces the belief that selections filed under its terms are essentially different from selections under other lieu acts that have been held to be within the purview of the acts providing for surface entries.

In the *Quinn* case the company was allowed to take a surface patent under the act of 1909, and by a parity of reasoning the company should be permitted to receive such a patent in this case.

The Commissioner's decision is reversed accordingly.

## STATE OF NEW MEXICO.

*Decided October 11, 1923.*

*See 51 L D 409*

### SCHOOL LAND—SURVEY—PLAT.

Where a township plat has been superseded by a corrected plat and there is a variance as to the acreage shown upon those plats in certain designated sections granted to a State for school purposes, a determination of the measure of the grant in those sections will be made in accordance with the plat subsisting at the date of the grant.

*FINNEY, First Assistant Secretary:*

This is an appeal by the State of New Mexico from a decision of the Commissioner of the General Land Office August 25, 1922, holding for cancellation the State's school land indemnity selection for lots 3 and 4, Sec. 3, T. 20 S., R. 12 W., N. M. P. M., Las Cruces land district, New Mexico. Part of the base offered in support of this selection was an alleged loss of 43.12 acres in Sec. 2, T. 12 N.,

R. 9 E., the cause of loss being designated as "Eaton grant." In the course of the Commissioner's decision it was said:

As shown by the plat of fractional survey of said T. 12 N., R. 9 E., Sec. 2 contains 664.41 acres in place, and the other school sections containing 640 acres each. Sec. 2 is shown to border on the Eaton grant. By the plat of protraction of the Eaton grant, no part of Sec. 2, T. 12 N., R. 9 E., is shown to be within the grant.

The selection of lots 3 and 4, said Sec. 3, is, therefore, hereby held for cancellation, subject to the right of appeal within thirty days from notice, or to the right of the State to file application to amend by the substitution of other and valid base, to the amount of 48.12 acres.

There is on file in the General Land Office a plat of survey of said township 12 N., R. 9 E., approved October 15, 1859, on which Sec. 2 thereof is shown to contain 696.66 acres. Another plat on file in that office, approved October 29, 1884, shows said Sec. 2 to contain 664.41 acres. The difference in acreage as shown by these plats is due to the fact that a protraction survey of the Eaton grant shows that it embraces a small portion of the east side of the section (32.25 acres) as surveyed in 1859.

The grant of sections 2 and 32 in every township in the proposed State of New Mexico was made by section 6 of the enabling act of June 20, 1910 (36 Stat., 557, 561). There had been no previous grant of such sections 2 and 32, nor had there been a reservation thereof, or either of them for a future grant to the State of New Mexico for any purpose. It results, therefore, that at the date of the grant, regard being had for the foregoing statement of facts with respect to the survey of the Sec. 2 here in question, the section as surveyed according to the amended and then subsisting official plat contained 664.41 acres, or 24.41 acres more than a full section. This same section 6 of the enabling act provided among other things not pertinent to this inquiry that where any of said sections 2, 16, 32, and 36, or any parts thereof—

have been sold, reserved, or otherwise appropriated or reserved by or under the authority of any act of Congress, or are wanting or fractional in quantity, \* \* \* the provisions of sections twenty-two hundred and seventy-five and twenty-two hundred and seventy-six of the Revised Statutes are hereby made applicable thereto and to the selection of lands in lieu thereof to the same extent as if sections two and thirty-two, as well as sections sixteen and thirty-six, were mentioned therein.

Said section 2275 as amended by the act of February 28, 1891 (26 Stat., 796), provides *inter alia* that when any section granted, reserved, or pledged for school purposes is included within any Indian, Military, or other reservation, or is otherwise disposed of by the United States, or where any such section is fractional in quantity, or wanting by reason of the township being fractional, or from any natural cause whatever the State may select other land in lieu thereof.

It is urged upon the appeal that—

The right of indemnity selection arises in this case by reason of the existence of the Grant, and whatever portion of section 2 is lost to the State by virtue of the existence of the Grant is said by the Act of Congress, approved June 20, 1910 (36 Stat., 557), and by sections 2275 and 2276 of the Revised Statutes as amended, to give rise to a right of indemnity selection.

It is not perceived how it may be well said that any portion of said section 2 as granted was lost to the State by reason of the existence of the Eaton grant or otherwise. The Congress undertook to grant said section in accordance with the then subsisting plat of survey.

It may be admitted for the sake of argument that if the previous protraction of the lines of the Eaton grant had not extended over or been superimposed upon the lines of the original survey, the State would have taken title to the full acreage as shown by that survey; still it does not follow that the State is entitled to indemnity for the superficial area subtracted therefrom by such protraction. The subject considered by and large it was the intention of Congress to grant a full section 2 in place containing 640 acres. If this section had been found to be fractional in the sense that it contained less than 640 acres, or if it or any part of it had been sold, reserved, or otherwise appropriated or included within any reservation or otherwise disposed of by the United States, the State would be entitled to indemnity to the extent of the loss on the basis of a grant of a 640-acre section only. Obviously there was no such loss, and none such is claimed. The Eaton grant had been surveyed and the township plat had been corrected when the grant to the State was made, and as was well said by the Commissioner, "no portion of Sec. 2, T. 12 N., R. 9 E., is shown to be within the [Eaton] grant."

The decision appealed from is affirmed.

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### WILDRICK v. THOMAS (ON REHEARING).

Decided October 11, 1923.

See generally  
24 Appeal Cases 487

LAND DEPARTMENT—OFFICERS—JURISDICTION—SECRETARY OF THE INTERIOR.

The Secretary of the Interior may delegate to the First Assistant Secretary and to the Assistant Secretary not merely administrative or ministerial duties, but also the duty to act judicially in review of the actions of the head of a bureau of his Department, and in matters requiring the exercise of such delegated authority, their powers are coordinate and concurrent with those of the Secretary himself.

### PRACTICE—REHEARING—APPEAL.

A motion for rehearing will not be sustained on the ground that the decision on the appeal is not supported by the law and the evidence where that question was presented by the appeal and fully considered and finally disposed of in the decision.

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## COURT AND DEPARTMENTAL DECISIONS CITED AND APPLIED.

Cases of *Turner v. Seep et al.* (167 Fed., 646), *Robertson et al. v. United States ex rel. Baff* (285 Fed., 911), *Rees v. Central Pacific Railroad Company* (5 L. D., 277), *Frost et al. v. Wenie* (9 L. D., 588), and *Cobb v. Crowther et al.* (46 L. D., 473), cited and applied.

FINNEY, *First Assistant Secretary*:

By his decision of August 13, 1923, the First Assistant Secretary of this Department, after a full consideration of the evidence, affirmed the General Land Office decision of November 18, 1922, which sustained the recommendation of the register and receiver, and dismissed James A. Wildrick's contest charging that land covered by Frank Thomas's homestead entry, Los Angeles 031386, is mineral in character, and was covered by a mineral location at the date of the entry on the ground that "the land is not shown to be mineral in character."

In his motion for a rehearing now up for consideration, the contestant attacks that decision on the grounds: (1) that the appeal should have been disposed of by the Secretary of the Interior in person, and not by the First Assistant Secretary, because the Secretary can not legally delegate his powers of adjudication in such cases; and (2) in effect, that the decision is contrary to the law and the evidence.

The first of these contentions is wholly without merit. While the Secretary of the Interior is "charged with the supervision of the public business relating to \* \* \* the public lands and mines" by section 441, Revised Statutes, Congress, by section 438, Revised Statutes, the act of March 3, 1885 (23 Stat., 478, 497), and otherwise, created the offices of Assistant Secretary and First Assistant Secretary of the Interior, and authorized them to perform such acts as the Secretary may prescribe, or as may be required by law; and that authority extends to the consideration and final adjudication of cases, such as the present one, which come up on appeals from the General Land Office (See section 439, Revised Statutes; 19 Op. Atty. Gen., 133; *Rees v. Central Pacific R. R. Co.*, 5 L. D., 277; and *Frost et al. v. Wenie*, 9 L. D., 588); and in doing so they act with full and complete authority, and not, as the movent contends, for the Secretary, or as deputies, but as officers having powers which are coordinate and concurrent with those of the Secretary himself. *Turner v. Seep et al.* (167 Fed., 646).

In *Robertson, Commissioner of Patents, et al. v. United States ex rel. Baff* (285 Fed., 911), it was specifically held that the Secretary of the Interior may delegate to the Assistant Secretary not merely administrative or ministerial duties, but also the duty to act judicially in review of the actions of the head of a bureau of his Department.

The present motion can not be sustained under the contention that the decision complained of is not supported by the law and the evidence, because that question was fully presented by the appeal from the General Land Office decision, and fully considered and finally disposed of in the departmental decision now complained of; and can not be again successfully raised in a motion such as the present one. *Cobb v. Crowther et al.* (46 L. D., 473).

The motion for rehearing must be, and is hereby denied.

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**CHARLES H. LOUD.<sup>1</sup>**

*Decided August 14, 1923.*

**COAL LANDS—LEASE—PROSPECTING PERMIT.**

The provision in section 27 of the act of February 25, 1920, limiting a person, association, or corporation to one coal lease during the life of such lease in any one State, is applicable to coal prospecting permits issued pursuant to section 2 of that act.

**COAL LANDS—LEASE—PROSPECTING PERMIT—ASSIGNMENT.**

The limitation in section 27 of the act of February 25, 1920, respecting the granting of but one lease during the life of that lease, is not to be construed as preventing one who has secured a coal prospecting permit or lease and assigned all rights and interests therein from thereafter securing a second permit or lease.

**FINNEY, *First Assistant Secretary:***

Charles H. Loud has appealed from the decision of the Commissioner of the General Land Office, dated March 22, 1923, rejecting his application, filed January 22, 1923, under the act of February 25, 1920 (41 Stat., 437), for a permit to prospect for coal upon Secs. 30 and 32, T. 2 N., R. 41 E., Sec. 6, and Sec. 8, T. 1 N., R. 41 E., M. P. M., Miles City, Montana, land district, because in conflict with a prior application for a similar permit filed by T. E. Smith on January 8, 1923.

Appellant admits the priority of filing by Smith, but points out that said Smith was, on September 21, 1921, issued a coal prospecting permit for 1980 acres of land in the same land district, which permit was assigned by him, with departmental approval, to one W. E. Holt. It is alleged that Smith received a substantial sum for this permit, and it is claimed that he is ineligible to acquire another permit, in view of the limitations of section 27 of the leasing act, and that the granting of a second permit would be to encourage "speculation" in coal permits.

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<sup>1</sup> See decision on rehearing, page 153.

Section 27 of the leasing act reads, in so far as is material to the question herein considered, as follows:

That no person, association, or corporation, except as herein provided, shall take or hold more than one coal, phosphate, or sodium lease during the life of such lease in any one State.

Provision is made for the issuance of permits to prospect for coal in section 2 of the leasing act in the following terms:

That where prospecting or exploratory work is necessary to determine the existence or workability of coal deposits in any unclaimed, undeveloped area, the Secretary of the Interior may issue, to applicants qualified under this Act, prospecting permits for a term of two years, for not exceeding two thousand five hundred and sixty acres; and if within said period of two years thereafter, the permittee shows to the Secretary that the land contains coal in commercial quantities, the permittee shall be entitled to a lease under this Act for all or part of the land in his permit.

As is shown, discovery of coal in commercial quantities will entitle a permittee to a lease, provided he is qualified under the act. The holding of one coal lease under said act would disqualify him to take another, although applied for as the result of discovery under a permit, and it follows, therefore, that the same limitation imposed by section 27 of the act as to leases must apply to permits which may ripen into leases.

In the case now under consideration, the issuance of a permit to Smith, under his second application, would not make him the taker or holder of more than one permit or lease, as he has parted with all his interest in the permit issued to him on September 21, 1921.

Nor does the Department perceive any reason why a second permit should not issue to Smith. He has expended money in discovering coal upon the lands covered by his original permit, and the fact that he preferred to sell his right to a lease thereunder, to an assignee approved by the Department, rather than maintain a mine upon said land should not operate as a bar to further development by him of unproven territory. The Government will in no wise be injured, nor will any interest in excess of that limited by Congress thereby fall into the hands of any person, association, or corporation. The charge of "speculation" made by appellant does not seem warranted by the facts.

The rejection of appellant's application was proper and the decision of the Commissioner is affirmed and the case closed.

**CHARLES H. LOUD (ON REHEARING).**

*Decided December 3, 1923.*

**STATUTES—WORDS AND PHRASES.**

In construing a statute it is permissible to substitute the word "and" for the word "or" when found necessary to do so in order to impart the true legislative intent as gathered from the context and the circumstances attending its enactment.

**COAL LANDS—LEASE—STATUTES.**

The purpose of the limitation in section 27 of the act of February 25, 1920, prohibiting anyone, except as therein provided, from taking or holding more than one coal lease during the life of such lease in any one State, was, according to the legislative intent, to place a restriction on the number of leases that may be taken or held simultaneously, but not as to the number that may be held in succession.

**FINNEY, *First Assistant Secretary*:**

Charles H. Loud has filed a motion for a rehearing of departmental decision of August 14, 1923 (50 L. D., 151), rejecting his application, Miles City 052422, filed January 22, 1923, under the act of February 25, 1920 (41 Stat., 437), for a permit to prospect for coal upon Secs. 30 and 32, T. 2 N., R. 41 E., and Secs. 6 and 8, T. 1 N., R. 41 E., M. P. M., because of its conflict with a prior and like application filed by T. E. Smith on January 8, 1923.

Smith, on September 21, 1921, had been granted a coal prospecting permit upon other land within the same State, which has been assigned with the Department's approval to W. E. Holt. A coal lease was issued under this permit and is now existing.

Loud contended in his appeal that Smith was not qualified to take another permit by reason of the restrictions in section 27 of the leasing act, and further contended that to grant Smith another permit, would be to encourage speculation in coal permits.

The appeal raised a question as to the construction of that part of section 27 of the act, reading as follows:

That no person, association, or corporation, except as herein provided, shall take or hold more than one coal, phosphate, or sodium lease during the life of such lease in any one State.

The Department held, that the above quoted provision applied to coal permits as well as coal leases; but that the issuance of a permit to Smith under his second application, would not make him the taker or holder of more than one permit or lease, as he had on December 20, 1922, parted with all his interest in the permit issued to him on September 21, 1921.

It was further held, as to the contention that the act complained of invited speculation, that—

Nor does the Department perceive any reason why a second permit should not issue to Smith. He has expended money in discovering coal upon the lands

covered by his original permit, and the fact that he preferred to sell his right to a lease thereunder, to an assignee approved by the Department, rather than maintain a mine upon said land should not operate as a bar to further development by him of unproven territory. The Government will in no wise be injured, nor will any interest in excess of that limited by Congress thereby fall into the hands of any person, association, or corporation. The charge of "speculation" made by appellant does not seem warranted by the facts.

The movant renews the contentions made in his appeal and more elaborately argues that under the provisions above quoted, no person can either *take* or *hold* a second lease during the life of the first, and that he could not either *take* or *hold* another permit that could ripen into a lease during the life of the first lease. Attention is called to a corresponding restriction regarding the issuance of oil and gas leases in the same section, which provides that—

No person, association, or corporation shall take or hold, at one time, more than three oil or gas leases granted hereunder in any one State, and not more than one lease within the geologic structure of the same producing oil or gas field.

It is insisted that the qualifying phrase "at one time," used in the last provision quoted, as to oil and gas leases, was intended to give an entirely different meaning and effect to the two clauses, and the phrase "at one time" can not, by construction be imported into the restriction as to the issuance of coal leases.

Taking the word "or" in its natural and ordinary meaning as a disjunctive particle, without other aids to construction, the clause in question may be interpreted as meaning that no person shall either *take* or *hold* more than one coal lease during the life of said lease in any one State.

It is, however, the duty of the Department, as it is of the courts, to ascertain and give effect to the real meaning intended to be expressed by a legislative act called in question, where such is reasonably possible. To this end it not infrequently becomes necessary to give a word a meaning other or different than that ordinarily assigned to it in common speech. Thus, "the word 'and' may be substituted for the word 'or' when necessary to make a statute express the true legislative intent as gathered from the context and the circumstances attending its enactment." Words and Phrases, Vol. 3, p. 758 and cases there cited.

The Department, in the decision complained of, in effect, construed the clause in question as if it read:

That no person, association, or corporation, except as herein provided, shall take *and* hold more than one coal, phosphate, or sodium lease during the life of such lease in any one State.

The reasons for such construction appear to be amply justified. The purpose of the act is to develop the mineral resources on public

lands. Both the context of this section, and the comments and debates that occurred during the genesis of these restrictions, in the public hearings on the proposed act before the committees of Congress, lead but to the conclusion that the purpose of these restrictions was to prevent monopoly and to prohibit one person or one group of interests from holding a larger quantity of land than they intended to operate.

If one disposes of his permit or lease to another who must comply with its conditions, and takes another lease or permit he does not hinder but furthers the object of the act.

The restriction as to the number of oil or gas leases is a restriction on the number that may be taken or held simultaneously and not in succession.

The Department therefore perceives no reason for, or evidence of, a different intent respecting coal leases.

Furthermore, the Department is not impressed with the argument that the decision is contrary to the spirit and policy of the public-land laws. The inhibition upon making a second homestead entry, where the relinquishment of the first has been sold for a valuable consideration, to which the movent invites attention, is not in point. Such an act does tend to defeat the object of the homestead law; the transfer of the rights and obligations existing under a coal lease or permit, and the taking of another does not interfere with the purposes of the leasing act nor does it contravene its provisions. The Department therefore sees no reason to disturb its decision in the case, and the motion is, therefore, denied.

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## IDENTIFICATION OF LANDS IN ALASKA—CIRCULARS NOS. 672 AND 845 AMENDED.

### INSTRUCTIONS.

[Circular No. 905.]

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

*Washington, D. C., October 15, 1923.*

REGISTERS AND RECEIVERS,

UNITED STATES LAND OFFICES IN ALASKA:

Owing to the difficulties encountered in the adjustment of conflicting claims for oil prospecting permits under the leasing act of February 25, 1920 (41 Stat., 437), for unsurveyed land in Alaska, section 4(d) of the regulations of March 11, 1920, Circular No. 672 (47 L. D., 437), and section 2(c) of Circular No. 845, approved August 12,

1922 (49 L. D., 247), are modified to make the following requirements:

WHERE PERMITS HAVE NOT ISSUED.

1. All applicants must hereafter describe lands with reference to true cardinal directions and in cases where applications have heretofore been made and can be conformed to such directions without prejudice to valid intervening claims said applications must be amended to conform to true cardinal directions.

2. In order to permit adjustment of conflicts the claims of all conflicting applicants must be identified with reference to a common monument which can be definitely ascertained and located upon the records and plats in this office.

These conflicting claims fall into two general classes: (a) Those involving lands located in the vicinity of the public land survey; (b) those involving lands which are removed from such surveys.

The following regulations are prescribed for the designation of these lands in applications for prospecting permit:

(a) In all cases where circumstances permit, applicants for prospecting permits for unsurveyed lands must describe the lands applied for by metes and bounds connecting such description by courses and distances to some monument of an approved public land survey.

The point of reference utilized may be the initial monument erected by another applicant who has described said monument by courses and distances with reference to a public survey monument, provided the location of said monument has been definitely established with reference to the public land survey. In such case, however, the location of the adopted monument, with respect to such public land survey monument, must be stated or the field notes or calculations by which the location of the applicant's initial monument with reference to the public survey monument was obtained, must be furnished.

(b) In cases where there are no available public land survey monuments the applicant for permit must describe the land by metes and bounds designating the location of his initial monument by courses and distances, with reference to such permanent monuments as will enable this office to identify its location from its records and maps. A plat or chart illustrating the location of said monument will aid in a determination of its location.

3. An applicant for permit must state, under oath, whether his application is for any lands described in any prior application, or in any notice posted on the ground within six months prior to the date of the filing of his application.

In the event that there are any prior conflicting claims for permits the applicant initiating the subsequent claim must describe the land desired with reference to the initial monuments of each prior claimant.

#### WHERE PERMITS HAVE ISSUED.

4. Numerous permits have been issued for unsurveyed land in cases where the Department could not determine whether conflicting claims existed, or the extent of apparent conflicts, upon the following conditions:

This permit is granted upon the express condition that the permittee will adjust any conflict with any prior applicant within six months from date hereof.

In numerous instances where conflicts have apparently existed the permittees have failed to comply with this condition. Any extension of time for beginning or completing drilling operations, granted pursuant to the act of January 11, 1922 (42 Stat., 356), does not extend the time for compliance with the foregoing condition and these permits are subject to cancellation for default in this respect.

5. All permittees who have received permits upon the foregoing conditions and are in default must, within ninety days from receipt of notice, submit:

(a) Their affidavits that there are no conflicting claims initiated simultaneously with, or prior to, their initiation of a claim to a permit, and where this office has stated that such conflicts apparently existed, they must furnish amended descriptions locating the claim with reference to the initial monuments of the prior claimants, clearly indicating that such conflicts do not exist; or

(b) Their affidavits showing an adjustment of these conflicts or such effort as was made to procure one, which must be accompanied by such amended descriptions with reference to the initial monuments of the prior conflicting claimants as will enable this office to make such final adjudication of rights as the facts may warrant.

(c) In the case of conflicting claims simultaneously initiated the claimants must furnish a description with reference to a public survey monument if possible, but if no such monument is available the parties must furnish amended descriptions with reference to a common monument.

6. Failure of the permittees to comply with the requirements of the preceding section shall constitute proper grounds for the cancellation of their permits without further notice from this office.

7. You will examine all applications for prospecting permits and require compliance with sections 1 and 2 hereof, within ninety days from notice, in cases where such applications do not comply therewith, transmitting said applications in due course with a report as

to the action taken. These regulations will be given the widest publicity possible without cost to the Government.

WILLIAM SPRY,  
*Commissioner.*

Approved:

E. C. FINNEY,  
*First Assistant Secretary.*

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**ELMER LAURITZEN ET AL.**

*Decided October 15, 1923.*

**COAL LANDS—WITHDRAWAL—IMPROVEMENTS.**

One who, prior to the passage of the leasing act of February 25, 1920, went upon lands embraced within an unreyoked coal land withdrawal and made large expenditures in the development of a coal mine thereupon acquired no legal rights by reason of such expenditures and improvements.

**COAL LANDS — WITHDRAWAL — LEASE — EQUITY — IMPROVEMENTS — OCCUPANCY — SECRETARY OF THE INTERIOR.**

The first proviso to section 2 of the act of February 25, 1920, authorizes the Secretary of the Interior to extend equitable relief by granting a lease without the necessity of competitive bidding to any properly qualified person, or association of persons, who, prior to the approval of the act, had in good faith substantially improved and occupied or claimed an area of public coal lands, not in excess of that to which a valid claim might have been asserted under the coal land laws, where no legal right to purchase is accorded by section 37 of the leasing act.

FINNEY, *First Assistant Secretary:*

By departmental order of February 9, 1923, Elmer Lauritzen *et al.* were afforded opportunity to submit an additional showing to support their claim to equitable consideration under the provisions of section 2 of the act of February 25, 1920 (41 Stat., 437), with respect to a certain described unsurveyed area which when surveyed will be approximately the SW.  $\frac{1}{4}$ , Sec. 3, N.  $\frac{1}{2}$ , Sec. 9, and NW.  $\frac{1}{4}$ , Sec. 10, T. 14 S., R. 7 E., S. L. M., Salt Lake City land district, in connection with application 025576 for a coal lease for an area embracing 2560 acres including that herein above described.

The facts in the case, so far as they were alleged or shown at the date of said departmental order, are set forth with considerable particularity therein and need not, therefore, be here again fully detailed. It is sufficient to say the lease application was filed June 21, 1922, in the name of Elmer Lauritzen. The application recited the making of large expenditures upon the land by Lauritzen, and in view of such expenditures the applicant prayed among other things, that the area embraced in the application be set aside as a leasing unit "and that he have a preference right to lease the said lands."

The Commissioner, however, by decision of July 18, 1922, held that Lauritzen was not entitled to a preference right to a lease for the land for the reason that the expenditures set up by the applicant as a basis for such a preference right were made on and after July, 1918, and while the land was in a state of withdrawal from disposition under the coal land laws by Executive order of July 6, 1910. From that action Lauritzen appealed and in connection with the appeal filed a petition for the amendment of the application so as to show that it was made by the said Elmer Lauritzen and R. W. Lauritzen, Andrew J. Hogan, Eugene Underhill, and O. D. Eliason, it being alleged in the petition that the said parties as an association, in September, 1918, entered into possession of the SW.  $\frac{1}{4}$ , Sec. 3, N.  $\frac{1}{2}$ , Sec. 9, and NW.  $\frac{1}{4}$ , Sec. 10, herein above described, and have been in exclusive possession of the land ever since, improving and developing the same; that at the present time there are on said lands improvements of a value of \$40,000, said improvements consisting of bunk houses, hoisting works, blacksmith and machine shops and other buildings, an incline shaft about 225 feet in depth and numerous other openings made for the purpose of exposing and developing the coal deposits on the land; that in July or August, 1918, the said Elmer Lauritzen consulted the local officers at Salt Lake City and was advised by them that he and his associates could initiate a preference right to the land and by expending the sum of \$5,000 thereon would be entitled to obtain 640 acres, but could not file application to purchase the same until the official plat of survey should be filed in the local office; that it was the association's intent from the outset that their claims should embrace 640 acres and that they would expend thereon the sum of at least \$5,000 as provided by sections 2348-2352 of the Revised Statutes and as a matter of fact, a sum in excess of \$7,000 was expended on the said area prior to the approval of the leasing act, in good faith, and without knowledge of any coal withdrawal affecting the same, until thereafter so informed by the Land Department through correspondence with regard to the leasing application, and only after there had been expended on the land a sum in excess of \$40,000. It was urged in the appeal that under the circumstances stated, the association was entitled to a preference right to a lease covering the said area of 640 acres under the provisions of the first proviso to said section 2 of the leasing act.

In its order of February 9, 1923, the Department called upon Lauritzen and his associates for an explanation as to Lauritzen's previous allegation of exclusive occupancy, possession and improvement of the land and also for a showing as to the qualifications of each of the members of the association to initiate a claim under the coal land laws, together with a detailed description and a statement as to the precise *loci* of the improvements alleged to have been made

upon the land prior to the approval of the leasing act. Such a showing has now been made and the Department finds the same sufficient to establish the asserted claim of the association to the said area of 640 acres, the expenditure of more than \$5,000 thereon for coal development purposes prior to the approval of the leasing act and the qualifications of the individual members of the association to initiate a claim to land under the coal land laws and to take a lease under the provisions of the leasing act.

The said proviso to section 2 of the act provides that "the Secretary of the Interior is hereby authorized, in awarding leases for coal lands heretofore improved and occupied or claimed in good faith, to consider and recognize equitable rights of such occupants or claimants," and the case presents for determination the question as to whether four persons, constituting an association, qualified to make entry under the coal land laws, who had in good faith prior to the approval of the leasing act and pursuant to favorable advice previously given them by the local officers, improved and occupied or claimed 640 acres of withdrawn coal land, but in ignorance of the withdrawal, thereby acquired something that might be considered and recognized by the Department as an equitable right, entitling the association to a lease with respect to the particular area without competitive bidding.

The Department after a careful consideration of the question is of opinion that the purpose of the said proviso was to authorize the Secretary to extend to any properly qualified person or association of persons who prior to the approval of the leasing act had in good faith substantially improved, and occupied, or claimed a particular area of public coal lands of the United States not in excess of that to which a valid claim might have been asserted under the coal land laws, equitable relief in cases where no legal right to purchase was accorded by section 37 of the leasing act so as to permit such person or association to secure a lease to the land so improved and occupied or claimed, without being compelled to enter into competition by bidding or otherwise, with some other person or persons for the privilege of leasing the claim as required by that portion of the section preceding the proviso and thus in effect relieve such claimant or claimants of the necessity of twice paying for the improvements.

It is clear that as to the land here involved the lease applicants although making large expenditures upon the land, acquired no legal rights on account of such expenditures because of the fact that the land was from and after the time of making said improvements and down to the approval of the leasing act, covered by the unrevoked Executive order of withdrawal of July 6, 1910. It is alleged by the claimants, however, that such expenditures were made in consequence of the advice of the local officers and that fact, together with the

magnitude of the expenditures made by the claimants would tend to indicate the utmost good faith on their part in the premises. In view of the foregoing it is held that the claimants are, all else being regular, entitled to a lease to the said 640 acres above described at rents and royalties not less than the minimum provided for leases under the act, to be fixed by the Secretary, and without competitive bidding. The remainder of the area included in the application will be put up and auctioned in the usual manner. The case is accordingly remanded for appropriate action in harmony with the views herein expressed.

### HEIRS OF JAMES BYRNE.

Decided October 26, 1923.

See page 418 627

#### REPAYMENT—WORDS AND PHRASES—STATUTES—ACT OF JUNE 16, 1880.

In coupling the expression "can not be confirmed" with the term "erroneously allowed," as those phrases are used in section 2 of the act of June 16, 1880, which authorized repayment where an entry was "erroneously allowed and can not be confirmed," the law necessarily contemplated an entry with reference to which the defect could not be cured.

#### REPAYMENT—DESERT LAND—RAILROAD GRANT—PAYMENT.

Allowance of a desert land entry under the act of March 3, 1877, for lands within the primary limits of a railroad grant, upon original payment of 25 cents per acre, was not erroneous, and, where, during its existence it could have been completed at the rate of \$1.25 per acre under regulations then in force, it was subject to confirmation within the meaning of the repayment act, and even under subsequent regulations to meet a new interpretation of the law, such an entry, if then existing, could have been completed upon payment of the unpaid portion of the legal price; hence, under either view, a proper case for repayment is not presented.

#### DEPARTMENTAL DECISION OVERRULED.

Case of William W. Brandt (31 L. D., 277), overruled.

#### FINNEY, *First Assistant Secretary*:

The heirs of James Byrne have appealed from decisions of the Commissioner of the General Land Office dated June 21 and July 27, 1923, denying their application for repayment of the money paid by Byrne in connection with his desert-land entry No. 023620, Helena, Montana, series, made April 20, 1886, for the S.  $\frac{1}{2}$ , Sec. 20, T. 9 N., R. 13 W., M. M., which was canceled May 10, 1889, upon his voluntary relinquishment.

The entryman paid \$80 at the time of entry, being at the rate of 25 cents per acre, as required by the desert-land act of March 3, 1877 (19 Stat., 377). Under the law then existing it was required that final proof of reclamation and the final payment be made within three years from the date of the original entry. The legality of this

entry was never questioned by the Government, but on the contrary, was permitted to stand as a legal entry for the full statutory period of its lifetime and until voluntarily relinquished as above stated. The certificate issued by the register and receiver at the time of entry recited that the entryman would be entitled to patent if within three years from April 20, 1886, satisfactory proof be made of reclamation of the land by carrying water thereon and upon payment of the additional sum of \$1 per acre. The said entry was within the primary limits of the grant to the Northern Pacific Railroad Company, as fixed by map of definite location filed July 6, 1882, and thereby brought under the operation of section 2357, Revised Statutes, which fixed the price of \$2.50 per acre for lands within the limits of railroad grants. However, in the early administration of the desert-land act the view obtained that inasmuch as that law specifically authorized allowance of desert-land entries at the rate of \$1.25 per acre, it operated independently of prior law in respect to the price at which the land was to be disposed of. That view of the law was subsequently changed, and by circular of June 27, 1887 (5 L. D., 708), the Department held that the price for lands within railroad limits entered under the desert-land laws was \$2.50 per acre. It was further provided, however, in the said circular that its provisions were not to have retroactive effect in cases where the regulations of the Department in force at the date of entry were complied with. The subject was further considered by Acting Secretary Muldrow under date of September 15, 1887 (6 L. D., 145). The question there involved was whether entries made at the rate of \$1.25 per acre within railroad limits prior to the date of the circular of June 27, 1887, could be completed at that rate or whether the \$2.50 rate would be applied as to such entries. In that connection it was said—

Now the former ruling of the Department which had been in existence from the date of the act until the date of the present circular, had, while it existed the force and effect of law so far as rights acquired under it are concerned. It was a construction of the law by the head of the Department charged with the execution of it, and the law was administered according to this construction.

The entryman made his contract under the ruling then in force, relying upon this construction thus adopted, and the mutual intention of both parties was that the land should be paid for at the price of \$1.25 per acre. This was the law then, and the contract was made with special reference to it.

It makes no difference that the construction of the law has changed. For the sound and true rule is that if the contract when made was valid by the law as then interpreted and administered, its validity and obligation cannot be impaired by any subsequent decisions altering the construction of the law. *Rowan et al. v. Runnels* (5 How., 134), *Ohio Life Ins. and Trust Co., v. Debolt* (16 id., 427), *Gelpcke et al. v. City of Dubuque* (1 Wall., 175).

From the foregoing I am clearly of the opinion that where entry was made of double minimum desert land prior to the promulgation of the circular

under consideration, the entryman should be required to pay but \$1.25 per acre for the land entered by him.

The act of March 3, 1891. (26 Stat., 1095), amendatory of the desert-land act of 1877, has been construed as fixing the price of lands entered under the desert-land law at the uniform rate of \$1.25 per acre, although located within railroad limits. It was held, however, by the Supreme Court in the case of *United States v. Healey* (160 U. S., 136), as to entries made prior to the act of March 3, 1891, that the legal price was \$2.50 per acre for lands so located. But that case involved an entry made in 1889, wherein the entryman had paid \$2.50 per acre in compliance with the aforesaid circular of June 27, 1887, and the court rejected his claim for repayment of the amount in excess of \$1.25 per acre. Soon after the decision in that case, it was invoked by one Holcomb to recover the amount of \$80 which he had paid on his desert-land entry for 320 acres made December 24, 1881, and which was canceled September 22, 1885, because of failure to submit final proof within the statutory period. The claim was presented under the provisions of section 2 of the act of June 16, 1880 (21 Stat., 287), on the theory that the entry was erroneously allowed and could not have been confirmed because the land entered was within the limits of a railroad grant and was not subject to entry under the desert-land law of 1877. He had paid the initial price of 25 cents per acre in accordance with the practice then existing, under which he could have completed the entry upon payment of the additional sum of \$1 per acre. In that case the Department decided (22 L. D., 604) that the entry was not erroneously allowed, and the application for repayment was denied. It is true that after the decision in the Healey case, *supra*, the Department required payment at rate of \$2.50 per acre for completion of existing entries made prior to the act of March 3, 1891, within railroad limits, but it was not held that they were illegal entries, and they were permitted to be completed and patented upon making proper payment. *Frederick W. Lawrence* (23 L. D., 450); *Kate G. Organ* (25 L. D., 231).

The application in the instant case is pressed for allowance under the doctrine applied in the case of *William W. Brandt* (31 L. D., 277), which was similar in essential respects to the facts here involved. In that case the Department held that the entry was erroneously allowed within the meaning of the repayment act of June 16, 1880, because it was made on the basis of payment at the rate of \$1.25 per acre, whereas, the correct price was \$2.50 per acre, and that it could not have been confirmed or completed by payment of the remaining portion of the purchase price at which it was made, and was, therefore, a proper case for repayment.

Upon thorough consideration of this question the Department has reached the conclusion that the reasoning employed in the Brandt case is unsound and should no longer be accepted as authority for allowance of repayment in such cases. It is accordingly hereby overruled.

Section 2 of the act of June 16, 1880, *supra*, authorized repayment where the entry was "erroneously allowed and can not be confirmed." Inquiry will be directed first to the question of error involved in the allowance of this entry. It was established in the case of *United States v. Ingram* (172 U. S., 327) that desert-land entries could be lawfully made within the place or primary limits of a railroad grant for the alternate sections not granted to the railroad. The effect of the grant in that respect was merely to raise the price from \$1.25 to \$2.50 per acre. The land was subject to desert-land entry. Therefore, the entry was not illegal from that cause. But it is claimed that the entry was illegal, or at least erroneously allowed, because the entryman engaged to pay at the rate of \$1.25 per acre, whereas, the lawful price was \$2.50 per acre. It should be observed at this point that we are concerned with the declaration usually called the original entry. The precise question at this stage is in respect to the regularity of the original entry. The desert-land act of 1877, under which the entry was made, required an initial payment of 25 cents per acre, and no other law, either prior or subsequent, required more. And there was no regulation of the Department violated in the allowance of this entry; hence, it was not erroneously allowed.

The next question is whether subsequent interpretation of the law prevented confirmation, that is, completion of title. As above pointed out, the Department after the date of this entry changed its view in respect to the proper price for lands so located, but the higher price was required only in case of future entries, and entries theretofore allowed were permitted to stand as valid and could be completed at the old price. Therefore, this entry was altogether unaffected by the new regulations and could have been completed at the rate contemplated at the time the entry was made.

But even if concession be made to possible argument that this latter regulation was too liberal and accorded existing entries more than the law, as correctly interpreted, justified, yet it still would have been possible to have carried the entry to completion by making proper payment and complying with other provisions of law respecting reclamation. There was no legal obstacle in the way to prevent confirmation. In coupling the expression "can not be confirmed" with the term "erroneously allowed," the law necessarily contemplated cases where the defect in the entry could not be cured, but which required cancellation. Such condition did not exist in the present case, whether viewed in the light of the departmental

regulations merely, or according to the law as finally determined. As stated by the court in the case of Ingram, *supra*—

It follows from these considerations that if the petitioner Ingram had fully complied with the terms of the desert-land act, he could, by payment of \$2.50 an acre have acquired title to the lands he sought to enter. Voluntarily abandoning his entry, he has no cause of action for the sum which he paid to initiate it.

The decision appealed from is accordingly affirmed.

### HEIRS OF JAMES BYRNE.

Motion for rehearing of departmental decision of October 26, 1923 (50 L. D., 161), denied by First Assistant Secretary Finney, December 5, 1923.

### BOJORQUES v. HEIHN.

Decided October 30, 1923.

512 10 25

#### RELINQUISHMENT—HOMESTEAD ENTRY.

see 50 L. D. 363

A letter written by a homestead entryman to a United States land office containing the statement, "I wish to relinquish all my claims on the land," is not sufficiently definite in its terms to indicate a present intention to relinquish the particular lands embraced in the entry.

#### CONTEST—PRACTICE—NOTICE—AGENT—ATTORNEY.

Under the Rules of Practice notice of contest must be served upon the entryman and service of notice upon his agent or attorney is insufficient.

#### CONTEST—PRACTICE—NOTICE.

The requirement in Rule 8 of Practice that proof of service of notice of contest be made within a specified time, where no answer has been filed, is mandatory, and, upon failure of the contestant to strictly comply therewith, the contest abates *ipso facto*.

#### DEPARTMENTAL DECISIONS CITED AND APPLIED.

Cases of Schmidt v. McCurdy (44 L. D., 308), and Whalen v. Hanson (47 L. D., 100), cited and applied.

#### FINNEY, First Assistant Secretary:

At the San Francisco, California, land office on April 21, 1920, Flora M. Heihn made entry under the enlarged homestead act for lots 6, 7, 8, Sec. 3, lots 8, 9, 10, 15, 16, Sec. 4, T. 13 S., R. 9 E., M. D. M. (306.77 acres), and on August 24, 1920, there was filed a paper appointing Gilmore and Gilmore, of Sacramento, California—

My agents to represent me in the above-entitled matter, and authorize them to accept service in my name and to do any and all things necessary to the purpose for which they are appointed, and request that you serve upon them all notices and other papers in any manner relating to the above-entitled matter.

On April 4, 1923, an application to contest the entry was filed by Angelo Bojorques, the affidavit charging abandonment for more than six months last past, followed by the required nonmilitary service averment. Notice for personal service issued, and on April 10, 1923, proof was filed that it had been served on Gilmore and Gilmore. No other service of notice was alleged.

On April 18, 1923, there was received at the local office the following:

STOCKTON, CALIF., April 16, 1923.

U. S. LAND OFFICE:

I wish to relinquish all my claims on the land.

FLOBA M. HEIHN.

Thereafter notice of a hearing was issued, to afford contestant an opportunity to submit evidence in support of the nonmilitary service averment. On motion of the attorney for contestant, the hearing was continued until July 9, 1923. On the date last named, contestant, by attorney, moved that the letter dated April 16, 1923, above quoted, be treated as the relinquishment of the entry, and that the record be forwarded to the Commissioner of the General Land Office. By decision dated August 1, 1923, the Commissioner refused to accept the letter as the relinquishment of the entry, and required contestant to make proper service of notice of contest or procure a proper relinquishment of the entry. Contestant has appealed, and calls attention to a letter of inquiry written by Gilmore and Gilmore to the local officers under date of August 30, 1923, wherein they stated:

A relinquishment, properly acknowledged, has been handed to us by a client of ours who wishes to file on this land. Knowing there has been a contest, we must find out first whether the land is clear and whether a filing by our client could be allowed.

Mrs. Heihn's letter of April 16, 1923, did not describe any land, nor state what "claims" she wished to relinquish. Moreover, the signature was not attested. The letter merely stated that she wished to relinquish her "claims on the land," but did not state that she "hereby relinquished" whatever claims she had in mind. In the absence of an identification of the "claims," or of a definite statement that she desired the letter to be treated as the relinquishment of her homestead entry, the Department would not be warranted in directing the cancellation thereof.

The Commissioner erred in proposing to allow the contestant to proceed further. Notice for personal service issued April 5, 1923, and after the lapse of sixty days without proof of service being filed, the contest abated under Rule of Practice 8, which provides:

Unless notice of contest is personally served within 30 days after issuance of said notice and proof thereof made not later than 20 days after such service,

or, if service by publication is ordered, unless publication is commenced within 20 days after such order and proof of publication is made not later than 20 days after the fourth publication, as prescribed in Rule 10, the contest shall abate: *Provided*, That if the defendant makes answer without questioning the service or the proof of service of said notice, the contest will proceed without further requirement in these particulars.

The Department held in *Schmidt v. McCurdy* (44 L. D., 508), referring to Rule 8:

The purpose of this rule is to expedite the orderly administration of the public land laws relating to the initiation of contests, and to prevent delay in the prosecution thereof to the detriment of a junior contestant. Under this rule, upon failure to make proof of service of notice of contest within the time specified, where no answer has been filed, the contest abates *ipso facto*, without the necessity of any action on the part of the adverse party or the local officers.

Service of notice of the contest on Gilmore and Gilmore was not service on entrywoman. The Rules of Practice provide for two methods of service of notice of contests—personally and by publication—and nowhere is provision made for service of notice on an agent or attorney. Under the designation by entrywoman of Gilmore and Gilmore as her agents, service of notice on them by the local officers of any requirement (such as for further showing of qualifications to make the entry, etc.) would have been binding on the entrywoman; but the agents were not authorized to accept service of notice of the contest.

The contestant failed to file proof of proper service of notice within the time allowed by the Rules of Practice, and as a consequence the contest abated. Rule 8 is mandatory, and has all the force and effect of law. *Whalen v. Hanson*, 47 L. D., 100.

The entrywoman and all parties interested were warranted in assuming that the Rules of Practice would be followed, and to allow the contestant to proceed further after the contest had abated would be inequitable.

The decision appealed from, modified to agree with the foregoing, is affirmed.

### McEUEEN v. QUIROZ.

*Decided October 30, 1923.*

#### PRACTICE—CONTEST—HEARING—EVIDENCE—OFFICERS—REGISTER AND RECEIVER.

Where testimony in a contest is taken before an officer designated for that purpose by the register and receiver the submission of further testimony by either party at the final hearing before the local officers is permissible only upon a proper showing, followed by a proper order by those officers.

PRACTICE—CONTEST—HEARING—EVIDENCE—CONTINUANCE—OFFICERS—REGISTER AND RECEIVER.

Submission of testimony at the final hearing before the register and receiver in a contest case, after the taking of testimony before a designated officer, is in the nature of a continuance and is to be governed by the Rules of Practice relating to continuances.

PRACTICE—CONTEST—CONTINUANCE—APPEAL—COMMISSIONER OF THE GENERAL LAND OFFICE.

The granting of a continuance in a contest case by the local officers is a mere interlocutory order from which an appeal to the Commissioner of the General Land Office will not lie.

DEPARTMENTAL DECISIONS CITED AND APPLIED.

Cases of *Cusaden v. Perley* (3 L. D., 145), and *Dahlquist v. Cotter* (34 L. D., 396), cited and applied.

FINNEY, *First Assistant Secretary*:

The above-entitled case, involving the stock-raising homestead entry of Presiliano Quiroz, made January 14, 1921, for Lots 3, 4, E.  $\frac{1}{2}$  SW.  $\frac{1}{4}$ , SE.  $\frac{1}{4}$ , Sec. 31, T. 10 S., R. 6 E., Lots 1, 2, 3, 4, 5, SE.  $\frac{1}{4}$  NW.  $\frac{1}{4}$ , S.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , Sec. 6, T. 11 S., R. 6 E., G. and S. R. M., within the Phoenix, Arizona, land district, against which William R. McEuen filed an application to contest on February 15, 1922, with allegations that—

said entryman never established residence on said land, and has never maintained a home on said land. Entryman's family has resided permanently in Tucson about 60 miles distant from said land, during past two years. That said entryman has totally abandoned said land during the past six months and that said absence from the land was not due to the entryman's employment in the military or naval organizations of the United States,

comes before the Department on the contestee's appeal from a letter of instructions dated July 12, 1923, wherein the Commissioner of the General Land Office returned the contest record to the local officers at Phoenix with instructions that they should set the case for final hearing, accept such testimony as had been offered and any further testimony which might be submitted, and render their decision, proceeding in the usual manner.

The history of the case is briefly as follows:

After the entryman had denied the contest allegations a trial was had before a designated officer at Casa Grande on April 20, 1922. The contestant gave notice that he intended to offer the testimony of some witnesses at the final hearing before the local officers, stating that said officers "have sanctioned this step, since it has been made a customary procedure." After three of the contestant's witnesses had testified his attorney stated that they had no further testimony to offer at that time but that they reserved the right to submit further evidence at the final hearing. The contestant was present but refused to testify even when called to the stand as a hostile witness

by the contestee's attorney. The testimony of the contestee and six other witnesses was offered.

The date of final hearing was fixed for May 10, 1922. On May 6th the contestant filed an affidavit for a continuance for 30 days on the ground that a material witness was absent in Mexico. The local officers granted a continuance to June 9, 1922, and on May 20, 1922, the contestee appealed, the full record being forwarded to the General Land Office with the appeal three days later.

On the date to which the final hearing was continued the contestant appeared with attorney and witnesses. The contestee appeared by counsel who objected to the submission of any testimony, but that of the contestant and four other witnesses was offered. Thereafter the contestant's attorney asked for another continuance for 30 days in order that the depositions of other witnesses might be taken. The local officers denied a further continuance.

On June 26, 1922, the Commissioner affirmed the action of the local officers in granting a continuance of the date set for final hearing. The Department affirmed the Commissioner's decision on January 11, 1923, holding that the contestee was without standing as an appellant because an appeal will not lie to the General Land Office from a mere interlocutory order, such as the granting of a continuance.

The contestant appealed on July 8, 1922, from the denial of the request for a second continuance, at the same time filing a certificate by the deputy sheriff of Pima County, Arizona, tending to impeach three of the contestee's witnesses. On June 12, 1923, the Commissioner returned to the local officers the transcript of testimony to be considered by them "with testimony submitted under further hearing provided for by departmental decision of January 11, 1923, promulgated by letter 'H' of March 13, 1923." The local officers again transmitted the record to the General Land Office, calling attention to the fact that no action had been taken on the contestant's appeal from the denial of a second continuance.

In the letter of instructions now complained of the Commissioner states:

The questions raised by the contestant in the appeal filed in your office July 8, 1922, were determined by the Department except that as to taking depositions and the filing of the certificate of the Deputy Sheriff of Pima County, Arizona. No objections by contestee to submitting this testimony appear, and in the light of the decisions of this office and the Department, such testimony would appear admissible. Such testimony, however, should be given only such weight as it may merit.

Apparently, the case is ready to be set down for final hearing by your office and decision rendered by you thereon. In the absence of other objections appearing on your records, you will take such action, permitting the testimony in question to be introduced.

The contestee has very properly appealed from the instructions given by the Commissioner. He did object to the allowance of a second continuance and to the submission of any evidence following the continued final hearing. In effect the Commissioner reversed the local officers and granted a second continuance.

Illustrative of the obviously irregular practice in this case and the apparently irregular general practice the following may be quoted from the final hearing:

Contestant's attorney: One more thing I want to say, that in asking for this permission to give testimony at the final hearing from the register and receiver, I had heard of this custom of giving testimony at the final hearing, had in fact been present at several such cases where much argument pro and con went on, and I was told by the register and receiver that their understanding of the proper procedure was that any one testifying at a first hearing could not later submit any testimony at the final hearing. I feared that if all my witnesses were used at Casa Grande in the first hearing, that the other side might reserve their main witnesses for the final hearing where I would be helpless in rebuttal, and for that reason,—during the taking of testimony at Casa Grande, attorney for the other side said he did not know whether he would bring in witnesses at the final hearing for his side or not; I thought he might, and that I believe is in the transcript of the testimony taken at Casa Grande. I felt it was necessary to play safe, and my client desires to give his testimony.

Contestee's attorney: I would like to have the record show as attorney for the entryman that I am very thankful that the statement last made by the attorney for the contestant has been made. The attorney's own words clearly indicate the viciousness of the practice which is attempted to be followed in connection with this case. This attorney has just stated and it is now a part of the record that she did not want to put on at the hearing in Casa Grande all of her evidence because the defendant might be in a position at that three-day hearing to put on evidence to rebut or refute the contestant's case, and for that reason, she reserved, apparently, several of her witnesses to have them testify at the final hearing in Phoenix, all for the purpose, as this attorney has just stated, so that the defendant would not be in a position of knowing all of the contestant's case and therefore also be not in a position to meet such evidence.

Contestant's attorney: The last statement is entirely in error. What I said was that what I feared was he would bring his witnesses to the final hearing; that they would try that trick. It has been done by attorneys in other cases, as I understand. Our case was clearly established in Casa Grande. All the allegations were thoroughly brought out, and the contestee had every chance to submit his evidence. I had no way of knowing whether the attorney for the contestee would put on any testimony at all at Casa Grande; nothing definite one way or the other; he did not have to put on any testimony there if he did not want to. And he might pretend to do so, and then later bring them all to Phoenix.

In the case of *Cusaden v. Perley* (3 L. D., 145), it is stated in a letter of instructions from the General Land Office to the local officers at Gainesville, Florida:

Under amended Rule of Practice 15, testimony in contest cases is authorized to be taken elsewhere than at the land office expressly for the purpose of sav-

ing parties the expense of going to the land office. When testimony is so taken, your duty at the "hearing" set before you is simply to consider and act upon the testimony taken before the designated officer. You can not require the parties, or either of them, to appear before you after you have directed the testimony to be taken by some other officer, nor can you receive supplementary testimony offered by either of the parties after the taking of testimony before the designated officer has been closed.

Rule 35 of the Rules of Practice approved in 1885 (4 L. D., 35, 41) reads in part as follows:

In the discretion of registers and receivers, testimony may be taken near the land in controversy before a United States commissioner or other officer authorized to administer oaths, at a time and place to be fixed by them and stated in the notice of hearing.

On the day set for hearing at the local office the register and receiver will examine the testimony taken by the officer designated, and render a decision thereon in the same manner as if the testimony had been taken before themselves.

In the case of *Dahlquist v. Cotter* (34 L. D., 396) the Department held that:

Where, as in this case, testimony is authorized to be taken elsewhere than at the local office, neither party should be permitted on the day of hearing to submit further testimony without due notice to the other, and appropriate order therefor made by the local office.

Rule 39 of the present Rules of Practice (48 L. D., 246, 253) reads as follows:

At the time set for hearing, or at any time to which the trial may be continued, the testimony of all the witnesses present shall be taken and reduced to writing.

It is clear from the foregoing citations that the submission of testimony at the final hearing should be allowed only upon a proper showing, followed by an order by the local officers, and that such proceeding is in the nature of a continuance. The Rules of Practice make ample provisions for continuances, and these rules should be observed when it is necessary to submit testimony at final hearings.

The local officers were clearly correct in refusing to grant a second continuance. The contestant did not apply for any order to take the testimony of the absent witnesses by deposition. From everything that is shown by the record the testimony of all the witnesses, except one or two, could have been taken at the trial or by deposition at that time. If the contestant had been diligent all depositions necessary could have been ready, undoubtedly, at the time of the continued final hearing.

The complete transcript of testimony is now before the Department and there appears to be no good or valid reason for not consid-

ering the case on its merits at this time instead of merely ruling upon the narrow question how the case should be remanded.

It was clearly established that the entryman and his family did not establish a residence on the land prior to February, 1922. There were some improvements on the land on February 5, 1920, when he filed his application, and thereafter he and his brothers placed some further improvements thereon.

Prior to February, 1922, the contestee's wife and children resided at Tucson. He spent some of his time there and at other times he was employed at various places. The contestant sought to prove that the contestee's wife first went to the land on February 20, 1922, after the contestee had notice of the contest. The latter and six of his witnesses testified that he and his wife went upon the land and established residence on or about February 3, 1922. The contestant was unable to refute the testimony that residence was thus established before the filing of the application to contest.

Witnesses for the contestant testified that they had seen the contestee's wife on the way to the land on February 19, 1922, but by testimony which was not refuted it was shown that she left the homestead on February 18th and returned on the 20th. In the meantime she was seen by the contestant's witnesses who concluded she was going there for the first time.

Even if the testimony of the three witnesses whose credibility was attacked should be eliminated, there were at least three other witnesses, whose credibility is not questioned, who testified to seeing the contestee and his wife on the land on or about February 3, 1922. They were positive it was before February 15, 1922.

It is true that the entryman did not establish residence on the land within six months from entry, nor even within a year, but residence was established before the institution of any contest and this contest must therefore fail.

The contestant also sought to show that the contestee was not holding the homestead in good faith, but this was not proved.

The contest is accordingly dismissed.

### CHARLES PERKINS (ON REHEARING).

*Decided October 30, 1923.*

#### RELINQUISHMENT—HOMESTEAD ENTRY—ESTOPPEL.

A relinquishment of a homestead entry which, except for the relinquishment, would have been confirmed under the proviso to section 7 of the act of March 3, 1891, estops the entryman from obtaining the benefits of the exchange of entry provision of the act of January 27, 1922, notwithstanding that the relinquishment was induced by adverse proceedings by the Government, instituted in accordance with the then existing practice, afterwards held to be unauthorized.

## LAND DEPARTMENT—PRACTICE—RES JUDICATA.

The application by the Department of the rule of *res adjudicata* to controversies in which final decisions have been rendered by it, is based upon the well-established principle that there must come a time when there is to be finality of action in order to prevent endless confusion in matters in which parties seek readjudication in the light of changes resulting from subsequent rulings of the Department or of the courts.

## DEPARTMENTAL DECISION DISTINGUISHED—DEPARTMENTAL DECISION APPLIED.

Case of Dorathy Ditmar (43 L. D., 104), cited and distinguished; case of Lillie M. Kelly (49 L. D., 659), cited and applied.

FINNEY, *First Assistant Secretary*:

Charles Perkins has filed a motion for rehearing in the case in which this Department by its decision of August 17, 1923, affirmed the action of the General Land Office in rejecting his application to make an exchange of entry under the provisions of the act of January 27, 1922 (42 Stat., 359).

The motion for rehearing contends that the Department erred (1) in placing too narrow a construction on the act of January 27, 1922; (2) in applying the doctrine of *res adjudicata* to this case; (3) in holding that the relinquishment executed by Perkins of his former entry was given voluntarily and not under duress; and (4) in holding that the relinquished entry is not a proper base upon which to predicate a selection under the exchange act.

It was admitted in the decision objected to that the original entry, in the light of later holdings by the courts and by the Land Department, would have undoubtedly been confirmed under the proviso to section 7 of the act of March 3, 1891 (26 Stat., 1095), had the entryman pursued his contention to a final adjudication instead of filing a relinquishment. It was further admitted that the adverse proceedings which the Government instituted against the entry doubtless induced the relinquishment.

The Department did not intend that it should be inferred from its decision of August 17, 1923, that it could not or would not reopen a case on proper showing where, after the rendering of its decision, the courts had held in another case based upon similar facts that its interpretation of the confirmatory provisions of the act of 1891 had been erroneous, and thereupon allow an exchange of entry to be made under the act of 1922, *supra*. But the filing of the relinquishment by the entryman estopped him from pursuing his claim further, and left no reason for the reopening of the case unless for good and sufficient cause the relinquishment should be set aside.

The act of January 27, 1922, authorizes the Secretary of the Interior to permit the exchange of entries by those whose original entries had been confirmed by law, and where, through an erroneous interpretation of the law, the Land Department had caused those

entries to be canceled and the lands disposed of to other parties. The right is granted only to one whose entry had been confirmed. No such privilege is extended to the subsequent entryman. The exchange must be a voluntary exchange. The act does not and can not compel such an exchange. The right to make the exchange necessarily implies the right to hold the land originally entered and to oust the subsequent entryman.

The movent for rehearing contends that the relinquishment in question was not a voluntary relinquishment and that Perkins should not, therefore, be estopped from making the exchange. If that contention should be sustained, the effect would be virtually to restore him to all the rights which he possessed under his original entry. It would thereupon necessarily follow that his entry had been confirmed and that he would be entitled to the alternative remedy of either dispossessing the subsequent entryman or of making the exchange. The contention that the relinquishment should be considered ineffective for the purpose of enabling Perkins to exercise the right of exchange of entry does not appear sound unless it should be held that the relinquishment was ineffective for all purposes. In the case of Dorathy Ditmar (43 L. D., 104), the Department held that a relinquishment executed under similar circumstances was to be deemed an involuntary relinquishment within the purview of the repayment laws. It is not here considered, however, that such holding with reference to repayment should be applied to a case in which the question of confirmation of an entry is at issue.

In applying the rule of *res adjudicata* to this case, the Department merely intended to reiterate the well-established principle that where it has rendered a decision which has become final, that decision will not be disturbed by it. Otherwise there would be uncertainty as to finality of action and endless confusion in matters in which parties seek readjudication in the light of subsequent changes in the rulings of the Department or of the courts. It is based upon the idea that there must be an end to litigation in a matter in which a final judgment has been entered. The rule of estoppel by adjudication is fundamental in the law, and is recognized as essential to the orderly administration of the laws of the United States by its executive officers as well as to the final determination of controversies in the courts. See Lillie M. Kelly (49 L. D., 659, 662), and decisions therein cited.

Accordingly the decision on appeal is adhered to and the motion for rehearing is denied.

## ACQUISITION OF INTERESTS IN LANDS IN RECLAMATION PROJECTS BY PROJECT MANAGERS.

*Opinion, November 5, 1923.*

### LAND DEPARTMENT—OFFICERS—PUBLIC LANDS—RECLAMATION—SECTION 452, REVISED STATUTES.

Section 452, Revised Statutes, which prohibits officers, clerks and employees in the General Land Office from directly or indirectly purchasing or becoming interested in the purchase of any of the public lands, is not to be construed as including officers, clerks and employees of the Bureau of Reclamation.

### RECLAMATION—PUBLIC LANDS—SECRETARY OF THE INTERIOR—SUPERVISORY AUTHORITY—OFFICERS.

While there is no Federal statute that prohibits project managers of reclamation projects from acquiring interests in lands, either public or private, within the projects under their supervision, yet it is within the supervisory authority of the Secretary of the Interior to forbid it by appropriate regulation.

### RECLAMATION—PUBLIC LANDS—OFFICERS.

Violation by a project manager of the departmental order of April 11, 1912, prohibiting superintendents of irrigation, engineers, or other officers or employees in responsible charge of a reclamation project, from acquiring any interest in property within that project, subjects him to disciplinary action, although the transaction may not be illegal.

### EDWARDS, *Solicitor*:

Reference is made to memorandum of October 13, 1923, by Administrative Assistant Burlew, requesting my opinion as to the legality of project managers of reclamation projects acquiring ownership of farms on the projects under their supervision.

Where lands are in private ownership, I know of no statute which would prevent a project manager from acquiring title to same. If it be deemed good policy to forbid such practice as conducive to favoritism in the distribution of water or unfair advantage in other respects, it appears to me that it is within the supervisory power of the Secretary of the Interior to forbid it by appropriate regulation.

In respect to the question of entering Government lands, there is a provision of law applicable to employees of the General Land Office. This is found in section 452, United States Revised Statutes, which provides:

The officers, clerks and employees in the General Land Office are prohibited from directly or indirectly purchasing or becoming interested in the purchase of any of the public land; and any person who violates this section shall forthwith be removed from his office.

Similar provisions were contained in the early act of April 25, 1812 (2 Stat., 716), which established the General Land Office as a Bureau in the Treasury Department, and the act of July 4, 1836 (5 Stat., 107), which reorganized the General Land Office.

It has been held that this inhibition applies not only to employees in the General Land Office proper, stationed at Washington, but also to employees in all branches in that office serving in the field, in local land offices, or in the offices of surveyors general. In 10 L. D., at page 99, it was said:

The object of Sec. 452 was evidently to remove from the persons designated the temptation and the power by virtue of the opportunities afforded them by their employment to perpetrate frauds and obtain an undue advantage in securing public lands over the general public by means of their earlier and readier access to the records relating to the disposal of, and containing valuable information as to, such lands. Officers, clerks and employees in the offices of surveyors-general fall clearly within the mischief contemplated by the statute, and the reason of the law applies to them with equally as much force as to those in the central office at Washington. Statutes and regulations of this kind are based upon grounds of sound public policy and their strict enforcement is essential to the good of the public service.

Opportunities for mischief similar to that intended to be remedied by this legislation may exist to some extent in the Bureau of Reclamation, the Office of Indian Affairs, and in the Forest Service, for these offices are all concerned in various ways with the disposal of public lands. However, I am of the opinion that the rules of statutory construction would not justify the interpretation that the law mentioned has application to these respective offices.

I understand that this matter is governed by regulation in the Forest Service. This Department has by regulation of June 29, 1909, forbidden employees of the Indian Service to enter public lands which are subject to disposal for the benefit of Indians, or which were acquired from Indians. There are also certain regulations by this Department concerning the holding of property by reclamation employees in reclamation projects. The Reclamation Manual (Volume 1, pages 45-46) contains the following:

*"Land ownership by employees.*—During the time of survey, examination, or preliminary study of a project it is not permissible for an employee of the Reclamation Service to become directly or indirectly interested in the lands or region under survey.

After a project has been determined upon and contracts let it is permissible for an employee of the service to purchase land for a home to be occupied by himself and his immediate family. This permission, however, does not extend to buying and selling as a dealer or speculator, but the intent must be merely to establish a home in good faith. (Regulations, June 24, 1905.)

Speculation in lands or loans or investments connected with the same, except as herein allowed, are strictly prohibited. Employees are in nearly all cases subject to transfer from one project or office to another as the interests of the service may require. Any interest which employees may secure in a project will not be permitted to interfere with a transfer required by the interests of the service. Any employee acquiring interest in land under a project does so entirely at his own risk, with the understanding that such interest

shall not interfere with such transfers as may be found desirable. (Order of September, 1909.)

No superintendent of irrigation, engineer, or other officer or employee in responsible charge of a reclamation project or unit of project will be permitted to acquire any interests in property within that project. This prohibition does not extend to laborers or assistants whose duties are confined to carrying out instructions given by chiefs but only to such men as initiate and put into effect those matters which are left to judgment and discretion. Rights initiated under the order of September, 1909, and prior to the date of this present order will be recognized as being within the scope of the said original order. (Order of April 11, 1912.)"

The order of April 11, 1912, above quoted seems to be sufficiently broad to forbid a project manager from acquiring any interest in land, either public or private, within the project over which he has jurisdiction. Any violation of this order would subject the employee to disciplinary action as an employee, even though it would not perhaps serve to make the transaction illegal, as being in conflict with statutory law.

Approved:

E. C. FINNEY,

*First Assistant Secretary.*

### **BARRUS v. McDONALD (ON REHEARING).**

*Decided November 8, 1923.*

*See 39 L 20160*

#### **NOTICE—CONTEST—CONTESTANT—ATTORNEY—APPLICATION—HOMESTEAD ENTRY—PREFERENCE RIGHT.**

Failure to serve notice of the cancellation of an entry under contest upon the attorney designated by the contestant in his application to contest does not relieve the contestant from fulfillment of the law with respect to the exercise of his preference right if he himself had been duly notified thereof.

#### **PREFERENCE RIGHT—CONTEST—CONTESTANT—APPLICATION—FEES—HOMESTEAD ENTRY.**

The presentation of an application in due form by a contestant to enter lands embraced within a prior canceled entry in the exercise of his preference right does not have any segregative effect as to the land involved until the required fees have been tendered.

#### **DEPARTMENTAL DECISIONS CITED AND APPLIED.**

Cases of Saugstad v. Fay (39 L. D., 160), McGraw v. Lott (44 L. D., 367), and Robert K. Cox and Earnest I. Alfrey (48 L. D., 267), cited and applied.

FINNEY, *First Assistant Secretary:*

By decision of July 25, 1923, the Department affirmed the decision of the Commissioner of the General Land Office dismissing the pro-

test of William T. Barrus, of Grantsville, Utah, against the homestead entry of Emma P. McDonald for the S.  $\frac{1}{2}$ , Sec. 28, T. 2 S., R. 6 W., S. L. M., Salt Lake City, Utah, land district.

It appears that Barrus, on April 26, 1921, filed application to contest a homestead entry for the described land. This application bore the following statement:

I desire that all papers affecting this contest be served upon me at the following address: P. L. Hansen, Salt Lake City, Utah, whom I hereby appoint my duly authorized attorney, 605 Scott Building, Salt Lake City, Utah.

The contestee defaulted, and on June 17, 1921, the Commissioner canceled his entry. On June 21, 1921, notice of this cancellation and of preference right of entry was served upon Barrus at Grantsville. His attorney was not notified of this action.

Barrus had, at the time of initiating the contest, supplied Hansen with funds to be used in the contest and in filing an application for the land. On July 18, 1921, Barrus filed an application for second homestead entry of said lands which was rejected on the same day because no fees had been paid. The attorney was not notified thereof although this application bore the following notation:

Please be advised that I have retained Mr. P. L. Hansen of Salt Lake City, Utah, to represent me before your offices in all matters arising therein and pertaining to this and my second homestead application.

On August 23, 1921, Hansen discovered from an examination of the records in the local office that the contest had been closed and Barrus's application rejected. He thereupon paid the prescribed fees and on the same day was advised by the local officers that Barrus's homestead application was rejected because in conflict with the homestead application of Emma P. McDonald, filed on July 30, 1921. Barrus appealed.

The Commissioner ordered a hearing on July 18, 1922, as to priorities of settlement between Barrus and McDonald, and denied Barrus's claim to a preference right of entry as a successful contestant because said right was not exercised within 30 days from notice.

In the decision of the Commissioner, affirmed by the Department on July 25, 1923, it was held that no valid acts of settlement were shown, and that protestant's attorney was not entitled to notice to exercise the preference right of entry. In support thereof the case of *Saugstad v. Fay* (39 L. D., 160), was cited, and in the Department's decision said case was stated to be controlling, and the case of *McGraw v. Lott* (44 L. D., 367), was cited as also in point.

In the first case it was held that—

All notices hereafter issued advising contestants of the cancellation of the contested entry and of their right to apply to make entry of the land in

virtue of the preference right given by the statute will be served *personally* upon the contestants at their address of record.

This rule was interpreted in *McGraw v. Lott*, *supra*, cited with approval in *Robert K. Cox and Earnest I. Alfrey* (48 L. D., 267), to include service upon (syllabus)—

\* \* \* some one duly authorized by him (the contestant) in writing to receive and receipt for the same, which must be evidenced by the signature on the return receipt of the party so authorized, as attorney or agent for contestant.

In the present case, the direction in the application to contest that "all papers affecting the contest" be served upon the contestant at the address of his attorney doubtless constituted an authorization in writing entitling the attorney to receive notice, as provided in *McGraw v. Lott*, *supra*.

The question remaining is whether the failure to notify the attorney is material in view of the fact that the contestant, who alone was qualified to exercise the preference, was duly notified of the cancellation of the contested entry.

While the notification of appointment of the attorney entitled him to notice of action taken, and to the privileges accorded attorneys under the Rules of Practice (48 L. D., 246), it did not relieve the contestant from a duty to exercise due diligence in asserting his rights. His failure to communicate with his attorney, when he received notification of adverse action upon his application, is admitted to have been due to his *erroneous* belief that two notices were being sent by the local officers, one of which would reach his attorney. This assumption was not warranted by the regulations governing cases of this kind, and such an assumption can not be recognized as a proper basis for equitable recognition to the prejudice of a claimant who duly initiated an entry of the same land in accordance with the law and the regulations.

The arrangement between the contestant and his attorney for the payment of the fees by the latter was a matter outside the record and between themselves. Although the contestant presented an application in due form it had no segregative effect as to the land involved until the proper fees were tendered, and, as shown, a valid claim had by that time intervened.

The Department finds that service of notice upon the contestant was sufficient to apprise him of his rights and to place full duty upon him to initiate a completed application within the preference period, and that failure to notify his attorney was not material.

The motion is denied and the case closed.

**E. H. VORDENBAUMEN.**

*Decided November 8, 1923.*

**NAVIGABLE WATERS—LAKE—LOUISIANA—PUBLIC LANDS—OIL AND GAS LANDS.**

Upon the admission of Louisiana to the Union the United States relinquished all claim to the lands underlying navigable waters in that State, and the transfer of that ownership being complete and final, the rule that the title to submerged lands remains after their reappearance in the one who owned the lands prior to their submergence can not be invoked by the United States with respect to an area covered with a body of navigable water at the time that the State was admitted.

**NAVIGABLE WATERS—LAKE—LOUISIANA—PUBLIC LANDS—OIL AND GAS LANDS.**

The area occupied by Cross Lake, Louisiana, being potentially navigable, although not actually used as a highway of commerce at the time that the State was admitted to the Union, is to be held as navigable on that date, and the title to all of the lands below the mean high-water mark passed to the State upon its admission by virtue of its sovereignty.

**COURT AND DEPARTMENTAL DECISIONS CITED AND APPLIED.**

Cases of *Ball v. Herbert* (3 Term Rep., 253), *Bucki v. Cone* (25 Fla., 1; 6 So., 160), *Pollard v. Hagan* (3 How., 212), and *Etoile P. Hatcher and W. M. Palmer et al.* (49 L. D., 452), cited and applied.

**FINNEY, First Assistant Secretary:**

This is an appeal by E. H. Vordenbaumen from the decision of the Commissioner of the General Land Office, dated July 19, 1923, rejecting his application for a permit to prospect for oil and gas, pursuant to section 13 of the leasing act of February 25, 1920 (41 Stat., 437), upon unsurveyed lands in the Baton Rouge, Louisiana, land district, described as follows:

All the land in the old bed of Cross Lake within the meander line of said lake lying east of the west Boundary line of Sec. 27, 34, T. 18 N., R. 15 W., La. Mer. Produced and west of the range line between Ranges 15 W. and 14 W. La. Mer. and frac. of lake bed in Sec. 1, 2, 4, 3, T. 17 N., R. 15 W., La. Mer. containing approximately 2529 acres more or less.

The Commissioner cited the decision of the Department in *Etoile P. Hatcher and W. M. Palmer*, on petition (49 L. D., 452), that Cross Lake was a navigable body of water at the time of admission of the State of Louisiana into the Union, in 1812, and held that, as title to the lands underlying the waters of said lake passed to the State as an incident of its sovereignty, they were not public lands of the United States, nor subject to the provisions of the oil leasing act.

In this appeal counsel for appellant advances arguments similar to those advanced by the same counsel in support of the claim of certain of the petitioners in the case of *Etoile P. Hatcher and W. M. Palmer*, *supra*, and contends that the body of water known as Cross Lake was never in fact a lake and denies that it was a navigable body of

water in 1812. An effort is also made to establish that the elevation of 172 feet adopted by the Department as the mean high-water line of the lake is erroneous.

It is urged by the appellant that the former Cross Lake was merely a body of backwater caused by the overflow from the nearby Red River during seasons of flood. It is conceded however that this situation was influenced by an obstruction in the bed of Red River, composed of logs and debris which collected upon sand bars in the bed of said river and from a period in the latter part of the eighteenth century up to the latter part of the nineteenth century constituted an obstruction of the channel. This obstruction was known as "the great raft," and was specifically referred to in reports to the Government as early as 1806, the date of the Freeman-Custis Expedition.

Cross Lake, as it existed from before 1812 until within comparatively recent years, covered an area embracing many thousand acres and was fed by numerous streams draining a general area of approximately 300 square miles, with an outlet into Red River at a point near the city of Shreveport. This former bed of the lake has been gradually drained within the past fifty years, and much of it is now occupied by settlers who have erected homes and improvements thereon.

Reports of recent investigations of the lands indicate that appellant's conception of the origin of the lake is erroneous. As stated, about 300 square miles are drained into this area, and the waters thus drained, if the outlet were dammed up, would shortly supply waters sufficient to restore the lake to its former condition. The rising of the Red River constituted such a dam in the first instance, and as the flood waters from the river were thrown into the lake their contact with the waters of the lake caused them to deposit the sand and silt which they carried, thus forming a permanent dam across the lower end of the lake which was not penetrated by the lake waters until after the raft had been removed and the channel of Red River had been greatly lowered. Thus it appears that Cross Lake was, in 1812, a permanent body of water created by natural causes, satisfying the general definition of such a body as:

A body of water which occupies a basin of greater or less depth, and may or may not have a single prevailing current. 24 Cyc., 841. See also *Hastie v. Jenkins*, 101 Pac. 495.

The account of the Freeman-Custis Expedition of 1806 indicates that travel through the lakes and bayous formed along the vicinity of Red River constituted the only possible navigation. The use of

Indian guides indicated that, while such travel was not frequent (as was to be expected of such an unsettled region), nevertheless these routes constituted the most feasible means of travel.

Reports from the recent examination of the land and appellant's brief show that prior to the Civil War and during its continuance the lake was used as a means of transporting firewood, logs, cotton, and other products to Shreveport. Both small steamers and flatboats appear to have been used. The designation of certain points along the former shore of the lake by such names as Page's and Bickham's Landings also indicates that the lake was used as a means of public travel. While there is no direct evidence that in 1812, the date of Louisiana's admission into the Union, the lake was in fact used to an appreciable degree for commerce or public travel, it nevertheless appears that certain well-defined channels existed free from obstructions, and that said lake was potentially navigable. Potential navigability is sufficient, for the essential characteristic of a navigable stream is that it is, or is capable of becoming, a public highway. *Ball v. Herbert* (3 Term Reports, 253). It is not the use which has been made of the water, but the use which may be made of it without change of condition which determines its navigability. *Bucki v. Cone* (25 Fla., 1; 6 So., 160).

Nor is the rule applied by the courts in the case of reappearance of lands after submergence applicable, as claimed by appellant. That rule, which restores the land upon its reappearance to its owner at the date of submergence or those in privity with him, can be applied only where lands have been appropriated, and, after a period of submergence, reappear, and its application is necessary to protect the former owner from injustice which would occur through the recognition of the claims of riparian owners.

In this case the owner at the time of submergence was probably France, or, if submerged before the discovery and conquest of this continent, its title was in no recognizable person or nation. It is clear that in 1812 the land was submerged, and the waters were navigable. Upon the admission of Louisiana as a State into the Union, the United States gave up all claim to the lands underlying navigable waters in said State, in order to give the new State sovereignty equal to that of the remaining States. *Pollard v. Hagan* (3 How., 212). This passage of ownership of said lands was complete and final, and can not be affected by the fact that the land has ceased to be submerged.

The State has long regarded the land in the former bed of Cross Lake as its property, and the Government has never disputed that claim. Indeed it now appears that the city of Shreveport has ac-

quired a deed from the State for these lands in order that the city may construct a reservoir thereon.

In view of the showings made and data available the Department entertains no doubts as to the navigability of the waters forming Cross Lake, and were it in doubt as to its character as a lake, a point equally clear to it, such doubt would not alter its conclusion that upon the admission of Louisiana as a State title to all the lands below the mean high-water line of Cross Lake passed to the new sovereign, whether the body of water was lake or stream. No consideration of any distinction between these two kinds of navigable bodies of water is required. The rule is the same in any event. *Pollard v. Hagan, supra.*

Appellant's claim that the establishing of mean high-water mark at 172 feet, as approved by the Department in authorizing a survey, is erroneous, is not convincing, and seems based upon circumstances which are exceptional rather than conditions which generally prevail with respect to this land. No reason is perceived for any modification of its previous rulings on this point.

It appears that this application involves certain of the areas designated in the order of October 28, 1922, as public lands erroneously omitted from the surveys in 1837 and 1838. These lands were withdrawn by Executive orders of June 2, 1910, and May 22, 1916, as parts of Petroleum Reserves Nos. 2 and 48.

The report by the examiner who made a detailed investigation of this area indicates that these lands are in most instances occupied by settlers.

Under these conditions the Department will be unable to determine the extent and area of lands which may properly be included in a prospecting permit, if one can properly be issued, nor can it determine the rights of any settlers with respect to such permits until the survey of said lands has been approved, and the settlers have been afforded an opportunity to apply for entry under the nonmineral land laws.

Appellant's application will be suspended until four months from date of approval of the survey authorized on October 28, 1922. At that time his application will be finally rejected as to the area within the then meandered line of Cross Lake, and such recommendations as the facts may warrant will be made by the Commissioner as to the remaining land.

The Commissioner's decision is modified to conform to the views herein expressed and the records returned for action in accordance herewith.

**EFFECT OF FILING OF ALLOWABLE DESERT-LAND APPLICATION  
RESPECTING THE RIGHTS OF THE APPLICANT—ACT OF SEPTEMBER 5, 1914.**

**INSTRUCTIONS.**

DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE,  
*Washington, D. C., November 12, 1923.*

REGISTERS AND RECEIVERS,

UNITED STATES LAND OFFICES:

September 13, 1923 (50 L. D., 135), the Department adopted the following administrative rule:

An allowable application to make desert-land entry will be treated as an entry within the meaning of the act of September 5, 1914 (38 Stat., 712), and if such an application is withdrawn prior to its allowance the applicant will be required, in connection with any subsequent application, to make the showing required of persons who seek to make second desert-land entries.

The right to make a desert-land entry is exhausted as effectively by the filing of an allowable declaration as if the entry had been actually allowed, in the absence of a sufficient and satisfactory showing of the right to make a second entry. It is not to be understood that where a declaration is rejected for conflict or other sufficient cause the desert-land right of entry is held to be exhausted, but where such declaration is subject to allowance and is withdrawn before such action is taken, then it is to be understood that the desert-land entry right is held to be exhausted, except as herein stated.

Under the act of September 5, 1914, *supra*, provision is made for the making of second desert-land entries under the conditions therein stated. When, therefore, a desert-land declaration is filed, unless rejected for conflict or other sufficient cause, a second declaration should not be accepted unless accompanied by a showing, by way of corroborated affidavit, of qualification to make it, the same as if applying to make a second desert-land entry.

If a prior application was filed, it should give the number thereof and description of the land by section, township, and range. In this event you will forward the papers to the General Land Office for consideration, following as closely as possible the instructions (43 L. D., 408) relating to second desert-land entries.

WILLIAM SPRY,  
*Commissioner.*

Approved:

E. C. FINNEY,  
*First Assistant Secretary.*

# **HEIRS OF ROBERT H. CORDER.**

*Decided November 13, 1923.*

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## **HOMESTEAD ENTRY—OIL AND GAS LANDS—PROSPECTING PERMIT—EVIDENCE—FINAL PROOF—PATENT.**

An application for an oil and gas prospecting permit embracing lands within a homestead entry, filed by the entryman during pendency of action by the Land Department upon the question of allowance of his final proof, constitutes an admission that the land had a prospective oil and gas value and amounts to an election to take a restricted patent in accordance with the provisions of the act of July 17, 1914.

## **BOARD OF EQUITABLE ADJUDICATION—JURISDICTION—HOMESTEAD ENTRY—PATENT—OIL AND GAS LANDS.**

Questions pertaining to the reformation of restricted patents issued in accordance with the provisions of the act of July 17, 1914, do not come within the jurisdiction of the Board of Equitable Adjudication.

**FINNEY, First Assistant Secretary:**

On October 17, 1916, Robert H. Corder, under the assumed name of John D. Corder, made enlarged homestead entry, serial 037084, for W.  $\frac{1}{2}$  SW.  $\frac{1}{4}$ , Sec. 29, and SE.  $\frac{1}{4}$ , NE.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , and lot 3, Sec. 30, T. 17 N., R. 28 E., M. M., 319.76 acres in the Lewistown, Montana, land district. His entry was amended, July 10, 1917, by substituting therein his real name, Robert H. Corder.

Final proof was submitted November 25, 1919, but action thereon was suspended on account of a protest by the Field Service, which was followed by charges against the entry, a hearing thereon, decision adverse to the entry by the local officers, and on appeal a reversal of said decision November 22, 1921, by the Commissioner who allowed the entry to remain intact.

Meanwhile, on November 23, 1920, Corder filed application 045172 for a permit to prospect upon said land for oil and gas under section 13 of the leasing act of February 25, 1920 (41 Stat., 437), which application was allowed May 5, 1921. By reason of this the Commissioner held, December 29, 1921, that it would be necessary for the entryman to file a waiver of the oil and gas content of the land and consent to the amendment of his homestead entry as having been made subject to the provisions of the act of July 17, 1914 (38 Stat., 509), and required him within thirty days to make the required showing, directing the local officers, in case such showing was made, to issue final certificate, noting thereon the proper reservation. On February 24, 1922, the register transmitted unclaimed registered letter containing notice of said decision and reported no action taken.

On December 20, 1922, the Commissioner held, in substance, that the land having been covered by Corder's homestead entry of

October 17, 1916, without mineral reservation, on which final proof was submitted November 25, 1919, and the entryman not having consented to an amendment of the entry whereby the oil and gas content of the land was reserved to the Government under the act of July 17, 1914, *supra*, such agricultural entry, having been allowed prior to enactment of the leasing act of February 25, 1920, *supra*, without mineral reservation, entitled the entryman to a preference right under section 20 of the leasing act, but in order to exercise such preference right he was required to accompany his permit application with a waiver of right to the oil and gas content of the land; that the issuance of final certificate on the entry was delayed by reason of a contest filed after final proof was made, and which was subsequently decided in favor of the entryman; and that he may be considered as having earned the title to an unrestricted patent on November 25, 1919, so that the granting of the permit was not regular and the application should properly have been rejected. The Commissioner accordingly in said decision directed the local officers to notify permittee that his permit was held for cancellation, and that unless within fifteen days he should appeal or file consent to receive a patent reserving the oil and gas content to the United States, said permit would be recommended for cancellation. On February 17, 1923, the register transmitted unclaimed registered letter containing notice of said decision, and reported no action taken.

On March 30, 1923, the Commissioner recommended to the Secretary the cancellation of the permit. On April 7, 1923, the Department returned the recommendation without approval, holding that—

The Department has held in a number of cases that where an entryman files an application for prospecting permit, as this entryman did, expressing the belief that the lands contained oil, this expression constituted an admission that the land had a prospective oil and gas value and offered a favorable field for prospecting operations, rendering unnecessary procedure under 12(c) of the oil and gas regulations as a basis for requiring the entryman to file his consent to a reservation of the oil and gas content of the land to the Government. It is also observed that no report from the Geological Survey is with the record passing on the inquiry as to whether or not the land should be impressed with a mineral reservation.

The entryman, Corder, having filed an application for a prospecting permit, will be regarded as having elected to take patent to the land embraced in his entry with mineral reservation under the act of July 17, 1914.

Your decision of December 30, 1922, therefore, is hereby vacated, the prospecting permit issued will remain intact, and a restricted patent should issue to the entryman all else being regular.

In pursuance of said departmental decision, the Commissioner on April 21, 1923, vacated his said decision of December 30, 1922, and impressed the homestead entry with said amendment under the act of July 17, 1914, *supra*, whereby the oil and gas content of the land was reserved to the Government.

The final certificate was amended accordingly, and in due course a restricted patent issued.

On July 24, 1923, Hattie Corder, an heir of said Robert H. Corder, filed with the register her affidavit, whereby it appeared that the entryman died on May 3, 1923; that the affiant was his daughter and one of his heirs, and made the affidavit in behalf of the other heirs as well as herself; that a restricted patent had been issued and was in the land office at Lewistown, and she requests that it be returned to the General Land Office, and that an unrestricted patent be issued for the land; that in behalf of herself and the other heirs she appeals "from the decision of the Department," and asks that her appeal and request be "submitted to the Equitable Board of Adjudication," and that an unrestricted patent be issued in lieu of the restricted patent.

On August 14, 1923, the Commissioner rendered his decision declining to cancel the restricted patent and issue one without restrictions, basing his decision upon the departmental decision of April 7, 1923, but allowing an appeal to the Department. Hattie Corder has appealed, bringing the case here for review.

This case does not fall within the jurisdiction of the Board of Equitable Adjudication, and no reason is shown that would justify a departure from the view taken by the Department in its decision of April 7, 1923, that the entryman's application for an oil and gas prospecting permit, pending decision allowing his final proof, amounted to an election to take patent to the land embraced in his entry with mineral reservation to the United States under the act of July 17, 1914, *supra*.

Therefore the decision of the Commissioner is affirmed.

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### FRANK P. DAWES.

*Decided November 13, 1923.*

#### RELINQUISHMENT—REPAYMENT—DESERT LAND—CONFIRMATION—ACT OF JANUARY 27, 1922.

A voluntary relinquishment, executed and filed in connection with a claim for repayment of purchase money paid upon a canceled entry which, except for the relinquishment and refund of purchase price, would have been entitled to confirmation under the act of March 3, 1891, amounts to a quitclaim, for a valuable consideration, of all the entryman's right, title and interest in and to the lands embraced therein, and precludes him from afterwards invoking the benefits of the exchange of entry provision of the act of January 27, 1922.

FINNEY, *First Assistant Secretary*:

Frank P. Dawes, who made desert-land entry, Helena 0783, October 12, 1908, for the W.  $\frac{1}{2}$  W.  $\frac{1}{2}$ , Sec. 20, T. 7 N., R. 8 E., P. M.,

Montana, has appealed from the decision of the Commissioner of the General Land Office, dated August 30, 1923, holding for rejection his application 014324, filed April 24, 1923, to select under the act of January 27, 1922 (42 Stat., 359), lots 6, 7, 8, 12, SW.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , Sec. 24, T. 46 N., R. 101 W., 6th P. M., Lander land district, Wyoming, under the exchange provisions of said act.

The record discloses that final proof was submitted on said desert-land entry December 31, 1912, and final certificate issued January 6, 1913; that on December 29, 1914, a special agent made an adverse report on said entry, and that on February 4, 1915, the Commissioner directed adverse proceedings against the entry, charging non-compliance with the desert-land law, and that the final proof was not made until after the expiration of the statutory period.

Notice of said charges was duly served as evidenced by the registry return card bearing the signature of Dawes. Under date of May 5, 1915, the local officers reported that Dawes failed to deny the charges or to apply for a hearing and recommended cancellation of the entry. The entry was accordingly canceled by letter "FS" of the Commissioner, on May 21, 1915.

The record further discloses that on January 8, 1919, Dawes made application for repayment of "such amount of money as may be found due; paid in connection with desert-land entry, Helena series 0783." With said application for repayment, he filed a relinquishment, and on April 10, 1919, there was issued in his favor, warrant No. 9315, in the sum of \$160 for amount of repayment of purchase money paid on said desert-land entry.

The act of January 27, 1922, *supra*, provides in substance, that the Secretary of the Interior may, in his discretion, permit the exchange of entries and transfer all payments to any other tract of surveyed lands, where a final entry of public lands has been canceled and such entry is held by the Land Department, or by a court of competent jurisdiction to have been confirmed under the proviso to section 7 of the act of March 3, 1891 (26 Stat., 1095), if such entries were disposed of to other parties, or patented to a claimant under other public-land laws.

In the case at bar, the record discloses that the land included in said entry of Dawes has been disposed of, being embraced in patented homestead entry, Helena 014335. The Commissioner held that one who has relinquished his entry can not invoke the benefit of said act of January 27, 1922.

The questions presented upon this appeal have had the careful attention of the Department. It is true said desert-land entry was canceled as the result of adverse proceedings initiated more than two years after the issuance of final receipt, and if the matter had rested

there Dawes might have been entitled to make entry under the exchange provisions of said act. But he later, however, as stated, applied for the return of the purchase money, with which he filed a relinquishment. The relinquishment was voluntarily given and the purchase money repaid. It amounted to a quitclaim, for a valuable consideration, of all his right, title and interest, in and to the lands embraced in his canceled entry.

The decision appealed from is accordingly affirmed.

### EVERETT LANFAIR.

*Decided November 13, 1923.*

#### INDIAN LANDS—TOWN SITES—OKLAHOMA—RESERVATION—SECRETARY OF THE INTERIOR—STATUTES.

The provisions of the acts of June 30, 1913, and March 3, 1919, which vested the Secretary of the Interior with the authority to dispose of the remaining unappropriated lands in the Kiowa, Comanche, and Apache Indian Reservations in Oklahoma, have no application to any unappropriated lands in the town sites within those reservations that were created pursuant to the act of March 20, 1906.

#### INDIAN LANDS—TOWN SITES—OKLAHOMA—RESTORATIONS—STATUTES.

The unappropriated lands within the town sites created pursuant to the act of March 20, 1906, in the Kiowa, Comanche, and Apache Indian Reservations in Oklahoma, are subject to disposition only in accordance with the terms of that act and Congressional legislation is necessary to effect their restoration to disposition in any other manner.

#### INDIAN LANDS—TOWN SITES—OKLAHOMA—APPLICATION—RESTORATIONS—PREFERENCE RIGHT.

Should Congress authorize the restoration of the unappropriated lands within the town sites in the Kiowa, Comanche, and Apache Indian Reservations in Oklahoma, one filing an application to purchase or enter any of those lands prior to such restoration would not acquire a preference right under such application unless the act authorizing the restoration should so expressly provide.

FINNEY, *First Assistant Secretary*:

Everett Lanfair has appealed from a decision rendered by the General Land Office August 16, 1923, affirming the action of the local officers in rejecting his application, Guthrie 013956, filed March 26, 1923, to make homestead entry for, or, in the alternative, to purchase, the SW.  $\frac{1}{4}$ , Sec. 36, T. 3 S., R. 16 W., I. M., Oklahoma. The reason given for the rejection was that the land in question is included within a town site withdrawal, and is not subject to disposition in the manner specified in the application.

The land is within that portion of the Kiowa, Comanche, and Apache Indian Reservations that was opened to entry under the act of June 5, 1906 (34 Stat., 213). The SW.  $\frac{1}{4}$ , S.  $\frac{1}{2}$  NW.  $\frac{1}{4}$ , and W.  $\frac{1}{2}$

SE. 4, Sec. 36, T. 3 S., R. 16 W., were withdrawn and reserved for the town site of Quannah September 12, 1906, pursuant to the act of March 20, 1906 (34 Stat., 80).

It is set forth in the appeal filed in behalf of the appellant that the town site of Quannah is one of the town sites set apart within the above-mentioned reservations that never got beyond the town site stage; that the land involved in this case is a "dead townsite tract," that has been vacant, unused, not subject to State taxation, and of no benefit to anyone since the town site was created. Reference was made to the acts of June 30, 1913, and March 3, 1919, and it is contended that under these acts the Secretary of the Interior has the authority to sell this and other tracts within said reservations at such times and under such terms as he may see fit to direct.

The appellant alleged in his application to make the entry that he is an honorably discharged soldier of the World War, and requested that he be given preference right of entry on account of his service. He further stated in his application that he desired to enter the land in question pursuant to the act of March 3, 1919, and asked that the tract be appraised as unimproved Government land. He offered to pay the first instalment as soon as he should be notified of the amount of the same, or to bid \$1500 for the tract and to pay the first instalment as soon as his bid should be accepted.

Section 17 of the act of June 30, 1913 (38 Stat., 77, 92), gave the Secretary of the Interior authority, in his discretion—

to sell upon such terms and under such rules and regulations as he may prescribe the unused, unallotted, unreserved, and such portions of the school and agency lands that are no longer needed for administrative purposes, in the Kiowa, Comanche, Apache, and Wichita Tribes of Indians in Oklahoma,  
\* \* \*

The act of March 3, 1919 (40 Stat., 1318), under which the application is purported to have been filed, contains among others the following provisions:

That the homestead entries made for pasture and wood reserve lands in the Kiowa, Comanche, and Apache Reservations, in the State of Oklahoma, opened to settlement and entry upon sealed bids, as authorized by the Act of June fifth, nineteen hundred and six (Thirty-fourth United States Statutes at Large, page two hundred and thirteen), be, and the same are hereby, made subject to contest, upon charges alleging that the entryman never established residence upon the land, or that having established such residence he failed to maintain same, or to improve and cultivate the land in accordance with law; and upon proof sustaining such charges, submitted in accordance with the rules of practice, the entries will be canceled and the money paid by the entrymen in default will be forfeited: *Provided*, That any person who has been residing upon the land for at least two years prior to the cancellation of such entry, and if there be no such settler, then the successful contestant, shall, if qualified to make a homestead entry, have a preference right for a period of sixty days from notice, to make a homestead entry for the land, paying

therefor the price bid by the original entryman, or a price to be fixed by appraisal upon the applicant's request, \* \* \*: And provided further, That any vacant lands in the wood and pasture reserves in said Indian reservations, opened to entry under said Act of June fifth, nineteen hundred and six, for which no preference right of entry exists, as herein provided, or under the Act of June twenty-eighth, nineteen hundred and six (Thirty-fourth Statutes at Large, page five hundred and fifty), shall be subject to sale at public auction to the highest bidder under rules and regulations to be provided by the Secretary of the Interior: \* \* \*.

The act of March 20, 1906, *supra*, authorized the Secretary of the Interior "to set aside and reserve from allotment or leasing such of the common grazing lands of said tribes as shall be necessary for the establishment of townsites;" and the act of June 5, 1906 (34 Stat., 213), provided that the unreserved and unallotted portions of the pasture lands should be "disposed of upon sealed bids or at public auction at the discretion of the Secretary of the Interior; to the highest bidder, under the provisions of the homestead laws of the United States."

On July 18, 1906, this Department designated a commission to select town sites within the pasture reserve. On August 20, 1906, that commission reported its selections, which were submitted with favorable recommendation by the Commissioner of Indian Affairs, and the report was approved by the Department September 12, 1906. Thereafter the selected tracts were duly platted. The records show that 37 lots within the town site of Quannah have been patented under the provisions of the act of March 20, 1906, *supra*.

The act of June 5, 1906, *supra*, merely provided for the opening of the remainder of the pasture lands under the provisions of the homestead laws. No reference was made therein to the town site law. The later acts of June 30, 1913, *supra*, and March 3, 1919, *supra*, have no application to the town site lands set apart under the act of March 20, 1906. The last-mentioned act contains, therefore, the only law under which the land involved in this case can be disposed of while it remains within the town site reservation.

It is an elementary proposition that rights in public lands, property of the United States, can initiate only under and in compliance with some act of Congress authorizing their appropriation. Neither settlement, improvement, payment of consideration, nor any other act not in pursuance of an act of Congress authorizing disposal of the land sought to be appropriated, gives any right to the applicant or claimant. See *Hutchings v. Low* (15 Wall., 77), and *Burfening v. Chicago, St. Paul, Minneapolis and Omaha Railway Company* (163 U. S., 321). When, therefore, Congress provided for the setting aside of the town sites by the act of March 20, 1906, and the Secretary of the Interior caused them to be set aside pursuant thereto, such action was conclusive on all parties, and the subsequent

acts, applicable to the pasture lands generally, were not applicable to the town site lands. The fact that portions of the town site in question have not been, and may never be, disposed of under the act pursuant to which it was created, does not warrant this Department in allowing appropriation of the undisposed of portions under other laws. Nor can the Secretary of the Interior declare that the town site has been abandoned and vacate it as to the undisposed of lands therein, unless he shall be specifically authorized by Congress to do so. Furthermore, should Congress authorize the Secretary of the Interior to dispose of the remaining lands in the Quannah town site, the appellant herein would gain no preference right to acquire any of those lands merely by virtue of his application here under consideration, without some provision conferring such right contained in the legislation by it enacted.

Accordingly the decision appealed from is affirmed.

### DEAN v. LUSK ROYALTY COMPANY.

*Decided November 13, 1923.*

MINERAL LANDS—OIL AND GAS LANDS—STOCK-RAISING HOMESTEAD—SURFACE RIGHTS—STATUTES.

The placer mining laws, which originally provided for the patenting of a fee estate in both the surface and the mineral deposits of public lands, were modified by the act of December 29, 1916, to permit of the issuance of separate patents for the reserved mineral deposits under the mining laws and for the surface lands under the stock-raising homestead act.

MINERAL LANDS—OIL AND GAS LANDS—ABANDONMENT—OCCUPANCY—STOCK-RAISING HOMESTEAD—ESTOPPEL—ADVERSE CLAIM.

Section 9 of the act of December 29, 1916, contemplated the perfection of claims by locators under the placer mining laws to the reserved mineral deposits, and possession of the land by a stock-raising homestead entryman with the acquiescence of a placer mining claimant does not constitute an adverse possession that will estop the latter from denying abandonment of the mining claim.

OIL AND GAS LANDS—PROSPECTING PERMIT—STOCK-RAISING HOMESTEAD—IMPROVEMENTS—DAMAGES.

A permittee under an oil and gas prospecting permit is not authorized to injure the permanent improvements of a stock-raising homestead entryman, and damages to crops must be compensated for as provided by section 9 of the act of December 29, 1916.

MINERAL LANDS—OIL AND GAS LANDS—PROSPECTING PERMIT—STOCK-RAISING HOMESTEAD—SURFACE RIGHTS.

A stock-raising homestead entryman does not have a sufficient interest in the reserved mineral deposits in the lands within his entry to entitle him to protest against the issuance of an oil and gas prospecting permit, except it be in his capacity as a citizen desiring to prevent the perpetration of a fraud upon the Government.

*See page 16*

## DEPARTMENTAL DECISIONS: CITED AND APPLIED.

Cases of *Coleman et al. v. McKenzie et al.* (29 L. D., 389), and *Purvis v. Witt* (49 L. D., 260), cited and applied.

FINNEY, *First Assistant Secretary*:

This is an appeal by Julius M. Dean from the decision of the Commissioner of the General Land Office, dated June 29, 1923, dismissing his protest against the issuance of a permit under section 19 of the leasing act of February 25, 1920 (41 Stat., 437), to the Lusk Royalty Company, for the W.  $\frac{1}{2}$  SW.  $\frac{1}{4}$ , Sec. 28, S.  $\frac{1}{2}$  N.  $\frac{1}{2}$ , Sec. 29, T. 36 N., R. 64 W., 6th P. M., Douglas, Wyoming, land district.

Appellant made stock-raising homestead entry for the above-described lands on January 25, 1919, pursuant to the act of December 29, 1916 (39 Stat., 862). Residence was established upon the land in June, 1919, and patent issued to appellant on October 21, 1922.

On August 25, 1920, the Lusk Royalty Company filed an application for a permit to prospect for oil and gas pursuant to the leasing act of February 25, 1920, *supra*. The company claimed relief under section 19 of said act, as assignee of fee title to certain oil placer-mining locations, including Glenrock No. 3, covering S.  $\frac{1}{2}$  N.  $\frac{1}{2}$ , Sec. 29, T. 36 N., R. 64 W., located May 7, 1917, and Mann No. 1, covering the SW.  $\frac{1}{4}$ , Sec. 28, T. 36 N., R. 64 W., 6th P. M., located September 22, 1917.

The following expenditures were claimed to have been made upon and for the benefit of these claims in 1918 and 1919, by the Cactus Oil Company, lessee:

On the SW.  $\frac{1}{4}$ , Sec. 28, T. 36 N., R. 64 W., a reservoir was constructed during the year 1918, for the purpose of collecting and storing water for drilling purposes, and a road was built on and across the NE.  $\frac{1}{4}$  of this claim for the purpose of hauling material, machinery, tools, etc., to the drilling site on this claim, cellars were dug and a derrick erected, all at a cost of more than \$250.

On the S.  $\frac{1}{2}$  N.  $\frac{1}{2}$ , Sec. 29, T. 36 N., R. 64 W., a road was built across this claim for the purpose of hauling material, machinery, and tools to the drilling site thereon, and a cellar was dug and derrick erected, and the drilling of a well was commenced. The cost of this work and improvements was in excess of \$250.

In his protest against the issuance of a permit to the Lusk Royalty Company, and upon appeal, Dean claims the mineral rights in the land, charges that at the time his entry was made the lands were vacant and abandoned, and that no work has been done thereon since June, 1919, and claims that the allowance of prospecting operations will result in irreparable damage to his crops and improvements and force him to abandon his home thereon.

The land was withdrawn for oil and gas by Executive order of October 23, 1918, and, with the exception of the S.  $\frac{1}{2}$  NW.  $\frac{1}{4}$ , Sec. 29,

is within the boundaries of the producing structure of the Lance Creek oil field, as defined by the Geological Survey on April 2, 1920.

The sole ground for dismissing Dean's protest, stated by the Commissioner, was that it was not supported by any corroborative affidavits. This action was correct. However the appeal contains the same allegations, which are now duly corroborated. The question to be determined is, therefore, whether the protest has any merit.

The protest clearly must be held insufficient in so far as it advances any claim by Dean to the mineral content of the land. By the provisions of the stock-raising act, as will be more fully herein-after shown, all entries made pursuant to that act and all patents issued thereunder must be "subject to and contain a reservation to the United States of all coal and other minerals in the lands so entered." Section 9, act of December 29, 1916 (39 Stat., 862).

Nor will the allowance of prospecting operations upon the land deprive him of his property without compensation, or otherwise interfere with his peaceful enjoyment and use of said land as contemplated by the law under which he acquired title. Section 9 of the stock-raising act provides that—

Any person qualified to locate and enter the coal or other mineral deposits, or having the right to mine and remove the same under the laws of the United States, shall have the right at all times to enter upon the lands entered or patented, as provided by this act, for the purpose of prospecting for coal or other mineral therein, provided he shall not injure, damage, or destroy the permanent improvements of the entryman or patentee, and shall be liable to and shall compensate the entryman or patentee for all damages to the crops on such lands by reason of such prospecting.

Thus it is clear that a permittee is not authorized to injure the permanent improvements of a stock-raising entryman and must make due compensation for damages to his crops.

There remains the question of abandonment.

Section 19 of the leasing act specifies the persons entitled to a permit thereunder as follows:

That any person who on October 1, 1919, was a *bona fide* occupant or claimant of oil or gas lands under a claim initiated while such lands were not withdrawn from oil or gas location and entry, and who had previously performed all acts under then existing laws necessary to valid locations thereof except to make discovery, and upon which discovery had not been made prior to the passage of this act, and who has performed work or expended on or for the benefit of such locations an amount equal in the aggregate of \$250 for each location if application therefor shall be made within six months from the passage of this act shall be entitled to prospecting permits thereon \* \* \*.

It appears therefore that on October 1, 1919, the Lusk Royalty Company, or its assignor, must have been, in good faith, occupying or claiming the land under the placer-mining laws in order to be entitled to a permit under section 19 of the leasing act.

The possession of the land by the appellant under the stock-raising act was not an adverse possession which, through acquiescence by the Lusk Royalty Company, constituted an abandonment of the claim by it, for the stock-raising act contemplates the perfection of claims to the reserved deposits and the patenting of the same under the placer-mining laws. Such an intention appears from the following provision of section 9 of said act:

The coal *and other mineral* deposits in such lands shall be subject to disposal by the United States in accordance with the provisions of the coal *and mineral land laws* in force at the time of such disposal. [Italics supplied.]

Although the placer-mining laws, which were in force at the time of appellant's entry, provided for the patenting of a fee estate in both the surface and mineral deposits of public lands, or an entire estate, the act of December 29, 1916, *supra*, modified said placer-mining laws so as to authorize the issuance of surface patents for lands of the character contemplated by the stock-raising act and duly entered thereunder, and authorized the patenting of the reserved deposits to mineral applicants under the placer-mining laws. This intent clearly appears from the following provision in section 9 of the stock-raising act:

*Provided*, That all *patents* issued for the coal *or other mineral deposits* herein reserved shall contain appropriate notations declaring them to be subject to the provisions of this act with reference to the disposition, occupancy and use of the land as permitted to an entryman under this act. [Italics supplied.]

Abandonment must be proved as a fact. It is a matter of intention to be arrived at by considering the acts of the locator. The leaving of tools and implements upon a claim has been held to be proper evidence that there was no intention to abandon it. Conversely, the removal of such tools and all material useful in development of a claim would indicate an abandonment.

The appellant's protest does not sufficiently allege the status of the land on October 1, 1919, to enable the Department to determine whether there was in fact an abandonment of the claim. Nor does the uncorroborated affidavit of the permit applicant as to development and expenditures "in 1918, and 1919," supply any satisfactory evidence on this point.

The case is remanded with instructions that the appellant's protest be dismissed, and that the Lusk Royalty Company be required to furnish a detailed statement of the work performed upon the lands involved, the cost of each general item, and the date of performance, specifically stating what improvements, if any, were upon the land involved on October 1, 1919, and what was being done with respect to these claims at that time. This showing must be in affidavit form and must be duly corroborated by the affidavit of at least one dis-

interested party having actual knowledge of the facts. Thirty days from receipt of notice will be allowed within which this showing must be filed, on penalty of rejection of the application.

As this appellant has no interest in the disposition of the reserved deposits other than as might arise from the granting of a permit to an insolvent party who would be unable to respond in damages for injuries to his crops and improvements, it is not considered necessary that he be served with a copy of this showing, or be further permitted to protest the issuance of a permit upon the grounds of abandonment (*Coleman et al. v. McKenzie et al.*, 29 L. D., 359), except in his capacity as a citizen desiring to prevent the perpetration of a fraud upon the Government, if such fraud should be attempted. *Purvis v. Witt* (49 L. D., 260). He gained no rights, with respect to the oil and gas deposits, by virtue of his stock-raising entry.

*Modified, 50210. 197* **GOTTLIEB ROTH.<sup>1</sup>**

*Decided November 13, 1923.*

**COAL LANDS—PROSPECTING PERMIT—LEASE—HOMESTEAD ENTRY—SURFACE RIGHTS—PREFERENCE RIGHT.**

Neither the leasing act of February 25, 1920, nor any other act of Congress accords to surface entrymen or owners under the homestead law a preference right to a coal prospecting permit or to a lease upon the land so entered.

**FINNEY, First Assistant Secretary:**

On July 23, 1923, Gottlieb Roth filed application, Bismarck series 021946, to have designated as a coal-leasing unit, under section 2 of the act of February 25, 1920 (41 Stat., 437), the SW.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , or lot 4, Sec. 30, T. 134 N., R. 90 W., 5th P. M., North Dakota.

Prior thereto, to wit, on July 11, 1923, Daniel Friesz and Otto Kuk made a like application, serial 021933, for the same tract.

The records of the General Land Office show that the tract above described is included in coal withdrawal, Executive order of July 7, 1910, and that on June 22, 1907, Gottlieb Glaser made entry, now Bismarck Serial 010459 of said tract and other lands, under the homestead law. Final certificate with a reservation of the coal issued April 30, 1914.

On September 1, 1923, the Commissioner of the General Land Office held Roth's application for rejection because of the priority of the application of Friesz and Kuk, and indicated that a recommendation would be made to segregate the tract as a coal-leasing unit under the last-named application.

Roth has appealed and alleges that—

he is the legal owner pursuant to the homestead laws of the United States upon the tract of land on which he applies for a coal lease, and has already performed

<sup>1</sup> See decision on rehearing, page 197.

preliminary development work to the value of about \$2,000.00 in preparing to operate a coal mine on said land, and has the mine on said land now in condition for successful operation, and if his claim is rejected, he will lose the value of such development work, which greatly added to the value of said land for mining purposes, and it would be unjust to him for others to secure the coal lease on said land and deprive him of the benefits of his development work.

The allegations above set out disclose no error in the Commissioner's action. Neither the entryman nor his transferee has acquired any right to lease or prospect for the coal by virtue of said entry. Neither the act of February 25, 1920 (41 Stat., 437), nor any other act of Congress accords to surface entrymen or owners under the homestead law, a preference right to a coal prospecting permit or to a coal lease upon the land so entered.

The records of the General Land Office do not disclose that any prospecting permit has been issued or assigned to Roth, nor does it appear that Roth had improved and occupied and claimed the coal deposits in good faith prior to the passage of the act of February 25, 1920. Roth has, therefore, not shown any equity that may be recognized in awarding a coal lease under this act. His occupation, improvements and the development of a mine of coal upon the land were, therefore, without sanction of law and unauthorized. The action of the Commissioner is right and is hereby affirmed.

Contemporaneously with this decision, the Department has approved the recommendation of the Commissioner that the tract above described be segregated as coal-leasing unit No. 363, North Dakota 35, and that this unit be offered for lease on the terms following:

1. A royalty of 10 cents per ton, mine run.
2. A minimum investment of \$400 during the first three years of the lease.
3. A minimum production of 400 tons commencing with the fourth year of the lease.

The lease will be auctioned and awarded to a qualified bidder of the highest amount offered as a bonus for the privilege of leasing the land in accordance with the provisions of section 13 of the coal regulations, Circular No. 679 (47 L. D., 493).

### GOTTLIEB ROTH (ON REHEARING).

*Decided January 9, 1924.*

COAL LANDS—LEASE—PREFERENCE RIGHT—PURCHASER—IMPROVEMENTS—SECRETARY OF THE INTERIOR—SUPERVISORY AUTHORITY.

Where one who is not entitled to a preference right to a coal lease has in good faith, under erroneous advice, opened and developed a mine of coal, the Secretary of the Interior has the authority to require one obtaining the lease pursuant to section 2 of the act of February 25, 1920, if another, to pay to the one making the improvements the amount that the land has been enhanced in value thereby.

FINNEY, *First Assistant Secretary*:

By decision of November 13, 1923, the Department affirmed a decision of the Commissioner of the General Land Office dated September 1, 1923, rejecting the application of Gottlieb Roth, filed July 23, 1923, to have lot 4 (or SW.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ ), Sec. 30, T. 134 N., R. 90 W., 5th P. M., North Dakota, designated as a coal-leasing unit under section 2 of the act of February 25, 1920 (41 Stat., 437). Contemporaneously with said decision, the Department approved the recommendation of the Commissioner of the General Land Office that the tract be segregated as coal-leasing unit No. 363, North Dakota No. 35, and that the unit be offered for lease on the terms following:

1. A royalty of 10 cents per ton, mine run.
2. A minimum investment of \$400 during the first three years of the lease.
3. A minimum production of 400 tons commencing with the fourth year of the lease.

It was further directed that the lease be auctioned and awarded to a qualified bidder of the highest amount offered as a bonus for the privilege of leasing the land in accordance with the provisions of paragraph 13 of the regulations (47 L. D., 489, 493).

The leasing unit was created on the application of Daniel Friesz and Otto Kuk, filed July 11, 1923, and it was because of the priority of the application of Friesz and Kuk that Roth's application was rejected.

A motion for rehearing has been filed on behalf of Roth, in which it is contended that Friesz and Kuk should be made to pay to Roth the sum expended by him for opening and improving the coal mine.

Upon consideration of the motion and accompanying showing, the Department directed the local officers to suspend action on the Commissioner's letter of November 10, 1923, authorizing the offering of the lease at public auction, and directed the chief of field division to investigate the character of work and expenditures made by Roth on the land involved.

The investigation ordered has been made, and a report thereof submitted to the Department, together with affidavits by Roth, Friesz, Kuk, and others. After reciting the facts, the special agent who made the investigation recommended that the application of Roth for a preference right to a lease receive favorable consideration.

The report of the field investigation corroborates the contentions of Roth, that he acted on the advice of those on whom he relied to the effect that because of the character of the coal deposit he was at liberty to mine and remove the same. He removed approximately 2,500 tons, and has tendered \$250 in payment of royalty therefor.

The stripping of the earth covering the coal was done at an expense of \$1200, and drainage ditches were constructed at a cost of \$150. Lumber and surveying cost \$150 additional.

While nearly all the coal uncovered has been removed, the stripping is of value to the purchaser of the lease, as it removes all doubt as to the character and location of the coal deposit. Considering the matter in all its phases, the Department is convinced that the value of the property as a coal mine to a purchaser of the lease has been enhanced by Roth's work to the extent of \$1,000.

There is no law under which Roth could be awarded a preference right to a lease, but in view of all the circumstances it would be inequitable to allow Friesz and Kuk or anyone else to reap the benefits of Roth's work without compensation to him therefor.

Accordingly, the leasing unit will be offered at public auction, after the notice required by the regulations, the published and posted notice containing a statement that the successful bidder, if other than Roth, must pay to Roth, on the day of the sale, the sum of \$1,000. X

The departmental decision of November 13, 1923, is modified to agree with the foregoing.

#### EFFECT OF RECORDATION OF NOTICE OF LOCAL LAND OFFICE PROCEEDINGS IN THE OFFICE OF A COUNTY RECORDER.

*Opinion, November 14, 1923.*

##### NOTICE—OIL SHALE LANDS—JURISDICTION—RECORDS—COLORADO.

The rules relating to notices *lis pendens* that are applicable to the courts have no application to proceedings before an executive department, and recordation in the office of the recorder of the county in which the lands are situated of proceedings in a local land office, there being no statutory requirement to that effect, neither constitutes constructive notice nor raises a presumption of notice.

##### NOTICE—OIL SHALE LANDS—LAND DEPARTMENT—JURISDICTION—RECORDS.

Where there is no law making it the duty of a county recorder to receive and record notices of proceedings in a local United States land office, the Land Department is powerless to enforce any order or regulation it might issue directing the recordation of such notices.

##### COURT DECISION CITED AND APPLIED.

Case of *Bassinger v. Spangler* (10 Pac., 809), cited and applied.

FINNEY, *First Assistant Secretary*:

By your [Commissioner of the General Land Office] letter FS, SVP of October 18, 1923, you request of this Department such "advice as may seem appropriate" in connection with—

The advisability of (1) filing for record in the office of the Clerk and Recorder of the county in which the lands are situated, notice of proceed-

ings pending in the local land office by the United States against certain oil shale mining locations, and (2) that if such locations are finally adjudged invalid, notice thereof in like manner to be filed for record with said Clerk and Recorder.

After giving the matter very careful consideration I fail to find any controlling reason for the filing and recording of the notices mentioned.

It can not be correctly said that they would furnish effective notice, or impart knowledge to anyone, because there is neither a Federal nor a State statute which requires or authorizes their filing or makes their recordation constructive notice, and they do not even have the sanction of, or come within the common rules relating to notices *lis pendens* which are applicable in courts alone and have no relation to proceedings by an executive department or officer.

The admitting of instruments to record and the effect of their being recorded are controlled in this country very generally by statutory enactments, and the recognized law on the subject is very well stated in 2 Devlin on Real Estate, Third Edition, section 656, as follows:

The registry acts authorize the recording of certain specified instruments, and their registration operates as notice. But the fact that an instrument is recorded is not sufficient to raise the presumption of notice, unless it be an instrument whose registration is authorized by statute. Otherwise the voluntary recording of it would be a nullity.

While your inquiry does not in terms relate to the filing of such notices in particular States it appears from correspondence accompanying your letter that you had Colorado in mind since the suggestion for the filing and recording of these notices came from the office of the chief of field division at Denver, and for that reason I will here refer to the fact that the statutes of that State specify the classes of instruments and documents that may be admitted to record and name the effect of their recordation, and in considering the effect of those statutes the supreme court of Colorado held in *Bassinger v. Spangler* (10 Pac., 809), that "the record of a bill of sale, since the law does not require or authorize such instruments to be recorded, is not notice to creditors of the vendor therein."

The only useful purpose that could therefore be accomplished by the issuing and recording of such notices would be the fact that persons seeking information would have an additional source to which they could go for inquiry, but it is not believed that the usefulness of such records for that purpose would be sufficient to justify a departure at this late day from the long established practice under which the records of the Land Department are considered as the only sources from which information can be secured as to proceedings affecting the disposal of public lands. In view of that estab-

lished practice it seems safe to assume that but very few, if any, persons seeking information would go to the office of the local recorder of deeds, or elsewhere than to the records of the Land Department proper to obtain it.

Aside from these considerations stands the fact that there is no law making it the duty of the local recorder to receive and register or record such notices, or to give them a place in his files. And furthermore, the laws of Colorado (section 2896, Mills Annotated Statutes) authorize the county clerk, who is *ex officio* recorder of deeds, to charge and receive fees in prescribed amounts for recording any "instrument authorized to be recorded," and section 1877 of that statute prescribes and penalizes the demanding or receiving of any "fee or compensation (by an officer) where no fee or compensation whatever is authorized or prescribed by law." Provisions similar to this are made in the statutes of other States.

From this it will be seen that this Department would be powerless to enforce any order or regulation it might issue directing the recordation of such notices.

For these reasons you are advised that in the opinion of this Department the suggested practice should not be adopted.

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**FRED. L. ALGER.**

*Decided November 17, 1923.*

**OIL AND GAS LANDS—PROSPECTING PERMIT—FORFEITURE—APPLICATION—RESTORATIONS—RECORDS.**

The language contained in paragraph 9 of the oil and gas regulations of March 11, 1920, declaring that in the absence of discovery of oil or gas within the period of a prospecting permit or extension thereof, the permit will thereupon terminate and the lands automatically revert to their original status, does not authorize another to file an application to prospect for the same deposits in the lands prior to the cancellation of the permit by the Commissioner of the General Land Office and notation thereof upon the records of the local land office.

**DEPARTMENTAL DECISIONS CITED AND APPLIED.**

Cases of California and Oregon Land Company *v.* Hulen and Hunnicutt (46 L. D., 55), and Martin Judge (49 L. D., 171), cited and applied.

**FINNEY, First Assistant Secretary:**

On April 24, 1923, Fred L. Alger filed application 046236, Lewis-town series, for a permit to prospect for oil and gas on the NE.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ , Sec. 11, T. 15 N., R. 29 E., M. M., Montana.

The local office rejected the application because the tract applied for was then covered by a subsisting oil and gas permit, 044271, issued to R. Channing Houghton on October 26, 1920.

The applicant appealed to the Commissioner of the General Land Office, and as grounds therefor, alleged, that no work had been done under the permit nor any application for extension of time had been filed by the permittee. The Commissioner affirmed the local office and rejected the application.

The applicant has appealed to the Department. He contends in substance, that as the permit of Houghton expired on October 26, 1922, the Commissioner, in rejecting his application violated the provisions of sections 7 and 9 of the oil and gas regulations, Circular 672 (47 L. D., 437, 443), particularly, the second paragraph of section 9 which reads as follows:

In the absence of discovery of oil or gas within the period of the permit or extension thereof, the permit will thereupon terminate and the lands or deposits will automatically revert to their original status, but the land will continue segregated pending action by the Land Department on any application for extension that is timely filed.

Although the provisions above quoted may be susceptible of the interpretation, that upon the expiration of the life of the permit, in the absence of a previous discovery of oil or gas or a pending application for extension of time to perform its conditions, the lands or deposits will revert to their original status and become subject to entry, the provisions quoted can not be construed to conflict with or override the salutary rule that—

Land segregated from the public domain, whether by patent, reservation, entry, selection, or otherwise, is not subject to settlement or any other form of appropriation until its restoration to the public domain is noted upon the records of the local land office.

(California and Oregon Land Co. v. Hulen and Hunnicutt, syllabus, 46 L. D., 55.)

In the case of Martin Judge (49 L. D., 171), it was held (syllabus):

Prior to the cancellation by the Commissioner of the General Land Office of an outstanding oil and gas prospecting permit and notation thereof upon the records of the local land office, no other person will be permitted to gain any right to a permit for the same class of deposits by the filing of an application, or by the posting of a notice of intention to apply for such a permit.

The action of the Commissioner is, therefore, correct and is affirmed.

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**HARVEY V. CRAIG.**

*Decided November 24, 1923.*

**OIL AND GAS LANDS—PROSPECTING PERMIT—RELINQUISHMENT—APPLICATION—PREFERENCE RIGHT—RESTORATIONS—RECORDS.**

A relinquishment of an oil and gas prospecting permit does not, of its own force, relieve the lands from the segregative effect created by the permit, and the filing of an application for a permit, predicated upon the relin-

quishment, prior to the cancellation of the permit by the Commissioner of the General Land Office and notation thereof upon the records of the local land office, does not confer upon the applicant any right to notice of the disposition of the prior existing claim or entitle him to any preference in the allowance of his application when the lands are formally restored.

**OIL AND GAS LANDS—PROSPECTING PERMIT—APPLICATION—COMMISSIONER OF THE GENERAL LAND OFFICE—REGISTER AND RECEIVER—OFFICERS—PREFERENCE RIGHT.**

Authority to consider and determine the merits and validity of applications for oil and gas prospecting permits, in the first instance, resides in the Commissioner of the General Land Office, and the fact that the local officers, whose functions in this respect are merely ministerial, received without rejecting an application, together with the prescribed bond and fees, does not of itself confer upon the applicant any right to have his application allowed.

**DEPARTMENTAL DECISION CITED AND CONSTRUED.**

Case of Martin Judge (49 L. D., 171), cited and construed.

**FINNEY, *First Assistant Secretary:***

On April 18, 1923, Harvey V. Craig, filed application, Roswell series 051409, for a permit to prospect for oil and gas, under the act of February 25, 1920 (41 Stat., 437), upon certain lands in T. 17 S., R. 27 E., N. M. P. M., New Mexico.

Simultaneously with this application a relinquishment was filed by J. C. Vandagriff of oil prospecting permit 048535, issued under said act and covering the identical lands applied for by Craig.

The local officers transmitted the said application and relinquishment to the Commissioner of the General Land Office, who, on May 29, 1923, accepted the relinquishment and canceled the permit. On September 24, 1923, the Commissioner held the application of Craig for rejection, basing his action upon the ruling in the case of Martin Judge (49 L. D., 171), which held that—

until an outstanding permit is canceled by the Commissioner and the notation of the cancellation made in the local office, no other person will be permitted to gain any right to a permit for the same class of deposits by the filing of an application therefor, or by the posting of notice of intention to apply for such a permit.

Craig has appealed and assigns as grounds therefor that (1) the case of Martin Judge is not in point; (2) the decision is not in accordance with the act of February 25, 1920; (3) neither Vandagriff nor Craig was notified of the acceptance of the relinquishment.

The arguments made by the appellant in attempted support of the first and second assignments of error are based on a misconception of the legal effect of (1) filing a relinquishment of an oil and gas permit; (2) filing an application for an oil and gas permit simultaneously with, or subsequently to, the relinquishment of a prior like

permit of the same land, and before the cancellation of the prior permit was noted on the local records.

Briefly stated, it is contended that, as the local officers received Craig's application with a bond and the fees prescribed in connection with such application, and as the relinquishment of Vandagriff's prior permit had been filed, and as the land was otherwise free from conflicting claims of record, upon the acceptance of Vandagriff's relinquishment and the notation of the cancellation of his permit on the local records, Craig's application was subject to allowance. It is argued that such allowance would not be the recognition of a preference right in Craig as his application was the only one "pending."

The offer of a permittee to surrender his rights under a permit, by filing a relinquishment thereof, by no means releases him from the obligations thereunder or operates to terminate any liabilities that may have been incurred by a breach of any of the conditions therein. The question whether, upon the filing of such a relinquishment, the bond should be released and the permit canceled is to be determined, in the first instance, by the Commissioner of the General Land Office upon the facts disclosed by the record, and upon such further showings as he may properly require. The filing of such a relinquishment, *ex propria vigore*, therefore, does not change the segregative effect of the prior, uncanceled permit upon the land applied for.

Neither can a right be predicated upon the fact that the local officers did not reject the application; but received the application, bond, and fees from the applicant prior to the cancellation of the existing permit. The duties and scope of the powers of the local officers in this connection are indicated in the first paragraph of section 4 of the oil and gas regulations (Circular No. 672, 47 L. D., 437, 438), which, so far as pertinent here, prescribes:

Applications for permits should be filed in the proper district land office, addressed to the Commissioner of the General Land Office, be suspended for 30 days to enable preference-right claims to be presented before action, and after due notation then forwarded for his consideration, with a full report as to status and conflicts.

It is obvious that under the provisions of the regulation quoted the authority to consider and determine the merits and validity of such applications, in the first instance, resides in the Commissioner of the General Land Office, and that the functions of the local officers in this connection are of a ministerial nature only.

The appeal presents no grounds for distinguishing the facts in this case from those in the case of Martin Judge, *supra*. Craig's application was filed before the cancellation of Vandagriff's permit was noted on the local records. This circumstance is sufficient to bring it within the rule announced in the case cited. Applying that rule to the case at bar it must be held that Craig gained *no* right by

filing his application under the circumstances above set out, and that means he has no such rights as he contends for, that is, to have his application considered and initiated *eo instanti* upon the notation of the cancellation of Vandagriff's permit, and no right to notice of the disposition of a prior existing claim. The Commissioner's decision is therefore correct and is hereby affirmed.

### MARTHA I. RICHARDSON.

*Opinion, November 24, 1923.*

#### CITIZENSHIP—MARRIAGE—DESERT LAND ENTRY—ACT OF SEPTEMBER 22, 1922.

Naturalization in a foreign country of a citizen of the United States is an act of expatriation which makes him a citizen of that country, and the citizenship of his wife, residing with him therein, is merged with that of her husband, if married prior to the passage of the act of September 22, 1922, irrespective of whether the expatriation occurred before or after the marriage.

#### CITIZENSHIP—MARRIAGE—NATURALIZATION—ACT OF SEPTEMBER 22, 1922.

United States citizenship lost by a woman as the result of marriage and residence in a foreign country with a citizen thereof before the passage of the act of September 22, 1922, can thereafter be restored, if at all, only by naturalization as prescribed by that act.

#### FINNEY, *First Assistant Secretary*:

Reference is made to your [Commissioner of the General Land Office] memorandum of November, 6, 1923, transmitting for instructions the case of Martha I. Richardson, wife of Sullivan C. Richardson, involving her desert-land entry made June 17, 1914, for certain tracts in Secs. 13 and 24, T. 7 S., R. 25 E., G. and S. R. M., Phoenix, Arizona, land district. The question presented relates to the citizenship of Mrs. Richardson.

It appears that the entrywoman was born in the United States as was also her husband. They were citizens of the United States at the time of her marriage in the year 1881. Soon after their marriage they went to live in Mexico in a colony where they remained about 30 years. On account of the revolutionary conditions they fled from Mexico as refugees in the year 1911. Sullivan C. Richardson, the husband, became a naturalized citizen of Mexico on October 12, 1898, according to the naturalization certificate now with the record. According to an affidavit of a person claiming to be perfectly familiar with the facts, having been a member of the said colony, it appears that Sullivan C. Richardson renounced his American citizenship and became a Mexican citizen, lived in the colony for about 30 years and was postmaster and municipal president of the colony. His desert-land entry made in the same vicinity as that of his wife is also under attack on account of his expatriation by naturalization in a foreign country and failure to have reacquired American citizenship. Other

entries in the same locality seem also to be involved in similar proceedings.

The question of law submitted in the case of Mrs. Richardson is whether she is to be deemed a citizen of the United States, because citizenship is a necessary qualification for making a desert-land entry. Much confusion is found in the adjudications, especially the earlier ones, in respect to the status of married women. During the early period of our Government, the English law denied the right of expatriation, and our courts were influenced by that doctrine to hold that marriage had no effect on the citizenship of a woman. However, our Constitution recognized the right of Congress to enact naturalization laws, and as early as 1790 provision was made whereby a person might become a citizen of this country by naturalization. The conflict between our law and that of England in this regard was one of the principal causes of the War of 1812. The question was not definitely settled by that war but England seems not to have pursued her view of inalienable allegiance thereafter with great vigor, and in 1870 the old common-law doctrine was abandoned by act of Parliament and the right of its citizens to expatriate themselves by becoming naturalized in foreign countries was declared.

While, as above mentioned, this country at an early date provided by law for conferring citizenship upon aliens through process of naturalization, and by the act of February 10, 1855 (10 Stat., 604), recognized the citizenship of women who married citizens of the United States, yet the right of expatriation was not provided by statute until the act of July 27, 1868 (15 Stat., 223), now contained in section 1999, Revised Statutes.

It seems of little value to concern ourselves with controversies over the question of the right of expatriation which may be found prior to the date of the act of 1868. That act definitely settled the question of the right of expatriation, but it did not define what steps would accomplish that status. Numerous decisions are to be found since the date of that act involving the question and they are not uniform. They seem to have depended upon the peculiar facts and circumstances of each particular case, the matter of intention being an important factor. Of course, naturalization in a foreign country is a definite and absolute process of expatriation from the land of nativity. But it is recognized that there are other methods of expatriation. Persons voluntarily emigrating from the United States to take up a permanent residence in a foreign country cease to be citizens of the United States. Wharton's International Law Digest, vol. 2, p. 447. And it has been held in many cases that a native woman marrying a foreigner takes the nationality of her husband, especially if they reside in a foreign land.

It is not believed necessary to review here the numerous decisions bearing upon this question. A very elaborate collection of references is contained in the work of Van Dyne on citizenship. After a thorough review of the authorities, he states that while they are not entirely uniform, yet the decided weight of authority is to the effect that the marriage of an American woman to an alien confers upon her the nationality of her husband. He quotes from Cockburn on nationality to the effect that in every country of the world (except where English law then prevailed, but which exception has now been removed by act of Parliament), the nationality of the woman merges in that of her husband; she loses her own nationality and acquires his. Under Spanish law a married woman follows the condition and nationality of her husband, and it would appear that the Mexican law is the same in this respect. It was held by the Mixed Commission on Mexican and American Claims that a married woman, by the mere fact of marriage invests herself with the nationality of her husband. See Morse on Citizenship, 217.

By the act of March 2, 1907 (34 Stat., 1228), it was provided in section 2 that any American citizen shall be deemed to have expatriated himself when he has been naturalized in any foreign State, or taken an oath of allegiance to any foreign State. Section 3 of that act declared that any American woman who marries a foreigner shall take the nationality of her husband. That act was confirmatory of some principles that had been established by weight of authority, and it settled a feature of the question much in dispute, namely, that expatriation might result from marriage to a foreigner, even though residence be continued in this country. It was so declared by the Supreme Court in the case of *MacKenzie v. Hare* (239 U. S., 299).

The Department believes that no point can be made of the fact that the entrywoman was a native citizen and was married to a native citizen who was not expatriated until after the marriage took place. The effect is the same in respect to the wife and it makes no difference that the expatriation of the husband took place after the marriage, for she emigrated from the United States to live in a foreign land and if she had not already by virtue of that residence become expatriated, certainly the fact of permanent residence taken in connection with the naturalization of her husband casts upon her the status of a Mexican citizen. It was not the ceremony of marriage but the state or condition of marriage to a foreigner that affected the citizenship. It was so held by the Supreme Court in the case of *Kelly v. Owen* (7 Wall., 496). In that case it was said that the husband's citizenship whenever it exists confers citizenship upon the wife. In that case the naturalization of the husband was after the date of the marriage. The converse of this would be true, espe-

cially when taken in connection with the establishment of residence in a foreign land with her husband who became a citizen there.

The law has since been changed by the act of September 22, 1922 (42 Stat., 1021), which expressly provides that marriage of a woman after the date of that act shall not affect her citizenship unless the husband be ineligible to citizenship, in which case she shall cease to be a citizen. That act also provides that a woman who had, before the passage of said act, lost her citizenship by reason of marriage to an alien eligible to citizenship may be naturalized in the manner therein provided. The latter act does not restore lost citizenship nor terminate citizenship then existing.

The view of the Department on the *prima facie* showing in the record is that this entrywoman lost her citizenship before the passage of the act last mentioned, and she may be restored to citizenship only, if at all, in the manner prescribed in that act. It is accordingly suggested that this entry be included among the other related cases in proceedings for cancellation on the ground that the parties are not citizens of the United States.

*Overruled as far as in conflict,*  
**HAYNES v. SMITH (ON PETITION).**

*Decided November 24, 1923.*  
*154 L.D. 150*

**OIL AND GAS LANDS—PROSPECTING PERMIT—SETTLEMENT—HOMESTEAD ENTRY—PREFERENCE RIGHT—WITHDRAWAL.**

A settlement claim made under the homestead laws prior to the inclusion of the land within a petroleum withdrawal, which did not ripen into an entry until after the creation of the withdrawal, affords the entryman no basis for a preference right to an oil and gas prospecting permit under section 20 of the act of February 25, 1920.

**OIL AND GAS LANDS—PROSPECTING PERMIT—SETTLEMENT—PREFERENCE RIGHT—RESIDENCE.**

The act of February 25, 1920, does not contain any provision whereunder a settler upon public lands within a particular State may be awarded a permit to prospect for oil and gas therein in preference to a resident of another State.

**OIL AND GAS LANDS—PROSPECTING PERMIT—DESCENT AND DISTRIBUTION.**

The rights of an applicant for an oil and gas prospecting permit under section 13 of the act of February 25, 1920, pass, on the death of the applicant, to the personal representatives in the same manner as does other personal property.

**DEPARTMENTAL DECISION CITED AND APPLIED.**

Case of Ada Fletcher (49 L. D., 204), cited and applied.

**FINNEY, First Assistant Secretary:**

This is a petition for the exercise of the supervisory authority of the Secretary in the matter of application 059902, of Roy S. Haynes, for a permit to prospect for oil and gas upon lots 2, 3, 5, 6, SE.  $\frac{1}{4}$

NW.  $\frac{1}{4}$ , NE.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , Sec. 1, T. 32 N., R. 34 E., M. M., within the Glasgow land district, Montana.

On January 25, 1916, Haynes filed an application, 037519, to make an enlarged homestead entry for the above-described land, which was accompanied by a petition for the designation of the land, but the application was rejected by a decision of the General Land Office of December 8, 1916, subject to the usual right of appeal and subject to the right of Haynes to furnish data requested by the Director of the Geological Survey. The land was withdrawn and placed within Petroleum Reserve No. 53 by Executive order of January 9, 1917. Under date of May 11, 1917, the local officers reported that notice of the decision was mailed to the applicant at his record address on February 17, 1917; that the notice was returned unclaimed, and no appeal was filed; that the case had been finally closed, and moneys deposited with the application were returned to Haynes under date of April 11, 1917.

An enlarged homestead entry of Haynes for the same described land was allowed April 12, 1918, subject to the provisions and reservations of the act of July 17, 1914 (38 Stat., 509), upon an application, 047735, filed April 17, 1917, with which was a petition for the designation of the land. Final proof was submitted on the entry June 21, 1919, upon which final certificate was issued June 24, 1919, and patent was issued January 6, 1920, containing the provisions, reservations, conditions, and limitations of the act of July 17, 1914, *supra*, as to oil and gas. At the final hearing Haynes and one witness testified that Haynes established his residence on the land during May, 1916, and another witness testified that Haynes established his residence thereon on June 1, 1916.

On October 11, 1922, the application 059902 of Haynes, for the permit, was filed and therewith was an affidavit executed by Haynes and corroborated by two witnesses, in which was set forth the history of the land as above recited, and it was stated that Haynes established his residence on the land on June 28, 1916. The applicant asked that his right be determined as of the date of his first homestead application, that is, January 25, 1916, and that he be granted a preference right under section 20 of the act of February 25, 1920, *supra*, and that his application 059902 be allowed.

The Commissioner of the General Land Office, in a decision dated March 23, 1923, held that in view of the fact that Haynes's first allowable homestead application 047735 was filed after the withdrawal, Haynes had no preference right, accordingly application 059902 of Haynes was rejected subject to the right of appeal. As is recited in the decision, the said application is in conflict as to

all the above-described tracts with application 059648 of Mary E. Smith, filed May 23, 1922, for a permit under section 13 of the act of February 25, 1920, *supra*, to prospect for oil and gas. Haynes appealed, but by a decision of July 16, 1923, the Department affirmed the decision of the General Land Office. The application 059902 was finally rejected in its entirety by an order of the Commissioner of the General Land Office dated October 1, 1923. On October 16, 1923, the petition herein considered was filed.

In the argument of counsel in support of the appeal the doctrine of relation was invoked in support of the contention that the date of January 25, 1916, should be considered as the date of the initiation of Haynes's homestead entry. The counsel for Haynes now asserts that the rejection of the application 059902 may be considered "legally correct," but contends that as to Haynes "equity is with him and upon all the facts we believe that should control." Counsel points to the facts that Haynes settled upon the land pursuant to his first application in the spring or early summer of 1916, before the inclusion of the land in the petroleum reserve, and has continued to reside there, and has improved the land and has made it crop and revenue producing; that he is a settler and a pioneer in Montana, helping in its development, while Mary E. Smith, a stranger to the land and not one of the pioneers of Montana, helping in its development, gave her post-office address as St. Paul, Minnesota. In view of these facts counsel states his belief to be that if the land should prove valuable for oil and gas Haynes, in all fairness and justice, should be entitled to the benefit thereof, and that it does not seem right that it should be otherwise. He states that Mary E. Smith included over 1,000 acres in her application, and that her husband has already been granted a permit to prospect for oil and gas.

Haynes could not under the law acquire the preference right which he attempted to assert by reason of his settlement on the involved land before the date of the withdrawal. See *ex parte* Ada Fletcher (49 L. D., 204). There is nothing in the act of February 25, 1920 (41 Stat., 437), which awards any preference right to a permit to prospect for oil and gas on lands in Montana to a settler in that State over a resident of another. One without legal rights has no equities. This seems to be the position of Haynes in this matter. Equity can not create a right which the law denies. The right of Mary E. Smith to file an application for an oil and gas prospecting permit for the tract covered by Haynes's patented homestead entry, the patent containing as to oil and gas the reservations and limitations of the act of July 17, 1914, *supra*, can not be arbitrarily denied under the law for the benefit of Haynes merely

because Haynes and his attorney think that it would be right and just to do so. It is, perhaps, needless to state that this Department has no legislative power and must leave to the action of Congress any suggested amendments of the act of February 25, 1920 (41 Stat., 437).

Counsel states that he was reliably informed that Mary E. Smith departed this life a number of months ago and "he knows of no law under which the heirs can take;" that while he is not informed as to the departmental construction or rule on that point, he asks that same be taken into consideration; that he stands ready to furnish evidence as to said fact, should it be desired. The rights of an applicant for a prospecting permit for oil and gas under section 13 of the act of February 25, 1920, *supra*, pass, on the death of the applicant, to his or her personal representatives in the same way as other personal property.

After mature consideration of the petition and the arguments advanced in support thereof, the Department is unable to see that there is any justification, either legal or equitable, for holding that Haynes is entitled to a preference right to a permit to prospect for oil and gas on the involved land, under section 20 of the act of February 25, 1920 (41 Stat., 437). In the presence, therefore, of the prior permit application of Mary E. Smith the application of Haynes must stand rejected.

The petition is accordingly denied.

### TIMBER TRESPASS—RULE OF DAMAGES.

*Instructions, December 12, 1923.*

#### TIMBER TRESPASS—PUBLIC LANDS—DAMAGES.

In the settlement of cases against parties who have innocently, but wrongfully, taken timber from public lands in States which have not prescribed rules governing the measure of damages, the stumpage value, or the value of the timber in the standing trees, constitutes the full measure of damages that the Government is entitled to recover.

#### DEPARTMENTAL CIRCULAR AMENDED.

Circular No. 881 (49 L. D., 484), amended.<sup>1</sup>

FINNEY, *First Assistant Secretary*:

You [Commissioner of the General Land Office] call attention to a difference of opinion in your office as to the proper interpretation of that part of Circular No. 881 (49 L. D., 484) issued March 14, 1923, which prescribes a rule for measuring the amounts to be demanded on behalf of the United States in settlement with persons who have innocently but wrongfully taken timber from Government lands in States which have not prescribed such rules.

<sup>1</sup> See Circular No. 900, page 223.

You say that it is contended by some that those amounts should be fixed in each case by deducting the total values of the labor and money expended in felling the trees, severing, transporting and sawing the logs and in the manufacturing of the lumber into articles of commerce, if so manufactured, from the value of the lumber or manufactured articles in its present place and condition; or in other words that only the "stumpage" value (the value of timber in a standing tree, *United States v. Mills*, 9 Fed., 684, 687; *Skeels v. Starrett*, 24 Northwestern, 98, 101) should be demanded; while others urge that the rule laid down in that circular contemplates the "severed" value or in other words that it does not warrant the inclusion of the cost of the felling of the trees and the severing of the logs in the cost items to be deducted from the present value.

The circular involved says that the amount to be demanded of an innocent trespasser or his innocent vendee shall be "the value at the time of conversion, less the amount which the vendor has added to its value"; and you request a departmental declaration as to the meaning of the language thus used, and also that instructions be given as to a proper modification of the circular, if the conclusions reached by this Department on this consideration call for such a modification.

This circular evidently attempted to follow the language used in the second sentence of the syllabus to the case of *Wooden-ware Company v. United States* (106 U. S. 432), which says that "the value (of the property) at the time of conversion less the amount which he (the vendee) or his vendor (the trespasser) have added to its value."

A critical analysis of the language of the circular and the syllabus shows that the circular did not follow the language of the syllabus in its entirety for the reason that the syllabus includes improvements made by both the trespassing vendor and his vendee, while the circular refers only to the value added by the *vendor*, and does not include values added by the vendee.

A response to your request does not call for a recital of the changing in history of the rule involved or an extended discussion of the mooted questions presented for the reason that it was definitely settled by this Department's decision of February 16, 1914, in the case of *John W. Henderson* (43 L. D., 106), that the former rule that the severed value only should be deducted was erroneous, and that "the stumpage value, and not the value after severance, is to be the measure of damages."

It is, however, believed that the language in which Circular No. 881 is couched calls for its modification. It is, therefore, directed that the second rule announced under the subheading "Timber" be stricken therefrom and that there be substituted therefor the following:

In cases of innocent trespasses neither the trespassers nor their transferees shall be required to pay more than the stumpage value, or the value of the timber in standing trees taken by them as damages to the Government.

### H. A. HOPKINS.

*Decided December 18, 1923.*

#### OIL AND GAS LANDS—PROSPECTING PERMIT—WITHDRAWAL—PREFERENCE RIGHT.

The definition of a structure as within a producing oil and gas field is in effect a withdrawal of the lands from appropriation under section 13 of the leasing act, and an application for a permit, even though filed prior to such definition, does not confer any rights on the applicant that will inure to his benefit upon the exclusion of the lands by reason of the redefinition of the structure.

#### OIL AND GAS LANDS—PROSPECTING PERMIT—REINSTATEMENT—RESTORATIONS.

Where an application for a prospecting permit is denied because of the inclusion of the lands within a producing oil and gas field, such application can not be revived by reinstatement upon a subsequent restoration of the lands, but they will be open to prospecting after their restoration as though no application had been filed.

#### DEPARTMENTAL DECISIONS CITED AND APPLIED.

Cases of *Hendricks v. Damon* (44 L. D., 205), and *Charles R. Haupt* (48 L. D., 355), cited and applied.

#### FINNEY, *First Assistant Secretary*:

On February 25, 1920, H. A. Hopkins, J. H. Raney, and the National Exploration Company, each posted notice of intention to apply for prospecting permits, pursuant to section 13 of the leasing act of February 25, 1920 (41 Stat., 437), for all Sec. 12, T. 30 S., R. 22 E., M. D. M., Visalia, California, land district. Each filed a proper application for a permit within 30 days thereafter.

The S.  $\frac{1}{2}$ , Sec. 12 was included in the limits of the geologic structure of the producing Elk Hills oil field, as defined by the Director of the Geological Survey on August 11, 1920; and these applications were rejected by the Commissioner of the General Land Office as to this land, for the reason that lands within known geologic structures of producing oil or gas fields are subject to lease only, under the act of February 25, 1920.

The Commissioner also required a compromise of the conflicts, in view of the simultaneous initiation of rights, the result being that Hopkins formally elected to receive a permit for the NW.  $\frac{1}{4}$ , Sec. 12, and acquiesced in the rejection of his application as to the S.  $\frac{1}{2}$ , Sec. 12, under an adjustment made by the Commissioner on March 21, 1921. Permit issued to Hopkins for the NW.  $\frac{1}{4}$ , Sec. 12, on May 23, 1921; and on June 9, 1921, this permit was assigned to K. C. Wallace, said assignment being approved by the Department on July 6, 1921.

On July 7, 1921, Hopkins filed an application for a redefinition of the geologic structure of the Elk Hills field so as to eliminate the S.  $\frac{1}{2}$ , Sec. 12, and requested the reinstatement of his application as to said lands. The Commissioner denied this request, and in a decision A-4533 (unreported) rendered February 28, 1922, the Department affirmed that action, finding that the lands were apparently within the geologic structure of the producing field as defined by the Geological Survey. This decision was made final, and the case was closed.

A second petition for the redefinition of the Elk Hills oil field and the reinstatement of his application was filed on June 27, 1923, by Hopkins, who showed that the Union Oil Company, alleged assignee of K. C. Wallace, had drilled a well to the depth of 4615 feet on the NW.  $\frac{1}{4}$ , Sec. 12, without a discovery of oil or gas. Although the assignment to the Union Oil Company never became effective because not approved by the Department, Hopkins filed quitclaim deeds of said permit from said company to Wallace and from Wallace to him, in order to establish his present interest. Said assignments have never been approved.

In order to show that the question of the redefinition of the structure and the reinstatement of his application was not finally determined by the departmental decision of February 28, 1922, *supra*, Hopkins cited the following statements made therein:

It is always possible that when a structure must be defined long before it is completely drilled up, it may include territory that will later prove to be non-productive and may exclude territory that later is proved to be productive, because no accurate prediction can be made as to the distance down the flanks of the fold to which the oil or gas pools will extend, but it is believed that the present definition of the Elk Hills fold is as accurate and as reasonable as it can be made with the facts now available.

In a decision dated September 4, 1923, the Commissioner cited a report from the Director of the Geological Survey, dated August 22, 1923, which stated that the data available did not warrant the exclusion of the S.  $\frac{1}{2}$ , Sec. 12 from the defined limits of the known producing field, and rejected Hopkins's application for reinstatement.

Hopkins has appealed, alleging that the data furnished warranted the exclusion of the land from the limits of the known producing structure.

It appears that, upon information received after August 22, 1923, the Department, on November 19, 1923, approved a redefinition of the boundaries of the known geologic structure of the producing Elk Hills field. As redefined the S.  $\frac{1}{2}$ , Sec. 12 is without the limits of the known producing structure and is, therefore, subject to pros-

pecting operations under permits issued pursuant to section 13 of the leasing act.

There remains the question whether appellant's application may be reinstated as to said land.

By the terms of section 13 of the leasing act prospecting permits may be issued for—

not to exceed two thousand five hundred and sixty acres of land wherein such deposits (of oil and gas) belong to the United States and are not within any known geological structure of a producing oil or gas field,

and by the provisions of section 32 of said act the Secretary is authorized "to fix and determine the boundary lines of any structure or oil or gas field, for the purposes of this act."

Provision for the definition of the boundaries of known geologic structures of producing oil fields is made in section 2 of departmental regulations, approved March 11, 1920 (47 L. D., 437), as follows:

The boundaries of the geological structures of producing oil or gas fields will be determined by the United States Geological Survey, under the supervision of the Secretary of the Interior, and maps or diagrams showing same will be placed on file in local United States land offices.

As shown herein, the Department recognized in its decision of February 28, 1922, the fact that errors might occur in determining the extent of known producing structures, but was not convinced that the land involved was improperly included in the producing structure as then defined.

Lands within a known geologic structure of a producing oil and gas field, defined in accordance with the leasing act and regulations thereunder, are not subject to applications for prospecting permits; and the fact that lands are thereafter excluded from such field does not operate to vest any rights in persons making permit applications for said lands prior to their exclusion. The rule stated in *Hendricks v. Damon* (44 L. D., 205), is applicable in such case. The Department held therein (*Syllabus*)—

Where a homestead application is rejected on the ground that the land was not subject to entry, an appeal entitles the applicant only to a judgment as to the correctness of that action at the time it was taken, and does not segregate the land from other appropriation if it in the meantime becomes subject to entry.

The necessity for such a rule is well illustrated by this case, in which, if it were held that the revocation of the definition of the structure related back to the time when made, the applications of Hopkins, J. H. Raney, and the National Exploration Company would each be entitled to reconsideration, despite the fact that they have accepted the rejection of their applications, and permits have issued to them for other lands.

Nor is the rule altered by the fact that these applications were filed prior to the definition of the known producing structure in August, 1920, and their applications were rejected under the rule stated in the case of Charles R. Haupt (48 L. D., 365) that—

When the limits of a producing field are determined, the determination must necessarily relate back to the time when the production began. Those who during that interval apply for permits under section 13 of the leasing act, covering lands in the neighborhood of where production was begun, are unavoidably at risk of rejection of their applications by reason of the belated inclusion of the lands sought within the field of production.

Once a structure is defined as producing, and this definition is acquiesced in by the persons whose applications preceded its definition, but were made after the discovery prompting it, they may not thereafter, by filing applications for reinstatement alleging later developments, revive their former applications, but must, in order to receive permits, file the first proper application after the lands are restored from the defined structure, which was, in effect, a withdrawal from appropriation under section 13 of the leasing act.

It is clear, therefore, that appellant's petition for the reinstatement of his former application as to the S.  $\frac{1}{2}$ , Sec. 12, was properly denied by the Commissioner. His decision is affirmed and the case closed.

## **RULE FOR ESTABLISHING BOUNDARIES OF RIPARIAN CLAIMS IN THE NORTH HALF OF THE BED OF RED RIVER, OKLAHOMA.**

*Instructions, December 22, 1923.*

### **SURVEY—RIPARIAN RIGHTS—BOUNDARIES—ALLOTMENT—OKLAHOMA.**

In establishing the side boundaries of claims of riparian proprietors to the area between the original meander line on the north and the medial line of Red River in Oklahoma in accordance with the decisions of the Supreme Court in the case of *Oklahoma v. Texas*, lines should be run from points representing the limits of frontage of the original claims on the meander line to points on the medial line at distances thereon proportionate to the lengths of frontage of the respective abutting owners.

#### **RULE IN COURT DECISION APPLIED.**

Rule in *Johnston v. Jones* (1 Black, 209), applied.

#### **FINNEY, First Assistant Secretary:**

Reference is made to your [Commissioner of the General Land Office] communication of November 10, 1923, in respect to the proposed survey of accretion lands and river-bed tracts riparian to certain Indian allotments bordering on Red River in Ts. 4 and 5 S., R. 14 W., Indian Meridian, Oklahoma, pursuant to decrees of the Supreme Court (256 U. S., 70; 258 U. S., 574; 261 U. S., 345; 262 U. S., 505, 724).

The court held that a portion of the boundary between Oklahoma and Texas is along the south bank of Red River; that no part of Red River in Oklahoma is navigable; that disposal of tracts along the north bank by allotment, entry, or purchase, or grant to the State of Oklahoma, carried title to the river bed in front of them out to the medial line but no further, the bed south of that line remaining the property of the United States; that as to tracts on the north side, not riparian when surveyed but which had become so when disposed of, such disposal carried the title to the medial line of the river, unless other tracts between them and that line had been disposed of theretofore, in which event the later disposal did not carry any right in or affect the title to such intervening tracts.

Pending decision in the controversy over the title to the bed of the river, the court established a receivership to conserve the interest of all parties in connection with oil development and production in the area involved. By order of June 11, 1923, the court directed release from the receivership of the lands embraced in four certain Indian allotments upon the conditions specified therein. The said tracts are as follows: Lot 4, Sec. 34, T. 4 S., R. 14 W.; Lot 1, Sec. 33, said township; Lot 6, Sec. 5, T. 5 S., R. 14 W.; Lot 5, Sec. 5, and lot 3, Sec. 8, T. 5 S., R. 14 W.

The order reads in part as follows:

It is ordered as to each of these tracts that the same, including so much of the bed of Red River as lies in front thereof and north of the medial line of the river, be released from the receivership, and the possession be surrendered by the receiver, upon fulfillment as to such tract of the following conditions, and not otherwise:

(a) The execution and presentation to the receiver of satisfactory agreements, approved by the Secretary of the Interior, establishing the side lines, from the surveyed upland on the north bank to such medial line, between such tract and the adjoining tracts on either side. \* \* \*

The matter now before me for consideration presents the question of the proper method to be employed in the establishment of the side lines of the tracts above described, and also certain other Indian allotments listed in section numbered 13 in the supplemental decree of the court of March 12, 1923 (261 U. S., 345), wherein it was held that the said allotments included and covered the right and title to the portions of the river bed between the tracts as surveyed and the medial line of the river.

The Commissioner of Indian Affairs has also requested extension of the surveys in respect to these latter allotments, or some of them, in order to facilitate proposed leasing.

You state that several of the private owners affected have indicated, in some cases formally and in other cases informally, an intention to accept the location of the side lines as established by this Depart-

ment, and that you are of opinion that controversy may be entirely avoided if a fair and impartial method may be adopted in advance of the survey. You suggest as an equitable and just method the rule applied by the Supreme Court in the case of *Johnston v. Jones* (1 Black, 209, 210), which, briefly stated, is to measure the whole extent of the ancient line of the river affecting the area involved, and compute the length of the portion of that line owned by each riparian proprietor; and then, as the second step, find the length of the new line upon which the survey is to be closed, and appropriate to each proprietor such proportion of the new line as he had of the old line; and third draw the side lines from the points at which the proprietors respectively bounded on the old line, to the points thus determined as the points of division on the new line. It was further stated in the rule that particular circumstances might require modification in application; for instance if the old line be uneven on account of deep indentations or sharp projections, the general line ought to be taken. This principle of adjustment would seem to apply equally in apportionment of the new line.

You have submitted diagrams delineating your conception of the effect of the application of this rule to the case in hand.

The Department concurs in the view that the principles contained in the rule referred to may be applied as an equitable and proper method for establishing the side lines in respect to the tracts here involved. It is well, however, to observe that, unlike the case of *Johnston v. Jones*, *supra*, the new front line here does not fall upon the shore, but midstream. In fact it is not a new line of ownership, but merely a line of new survey to indicate the present location of the middle of the stream, which, although variable and not heretofore identified by survey, has always been the limit of title acquired by the Government disposal of the tracts.

Fitting the rule to suit the conditions of this case, I think the old front or meander line of the respective lots should form the basis for claim to the river-bed lands. The front line of the old survey will become the back line of the new survey, and the medial line of the river as defined by the court will be the front line of the supplemental survey. The side lines will then be drawn as stated in the rule.

The diagrams submitted indicate a plan whereby two steps or surveying processes are contemplated to reach the medial line. The lands formed by accretions, where such formations exist, are apportioned under this suggested plan to the respective riparian owners, and then these tracts are in turn used as bases for apportionment of the river-bed area among the several owners. In my opinion this intermediate actual shore line should be eliminated from considera-

tion. It has never been a boundary line and will not become such. In legal contemplation these accretion areas and river-bed areas in front of the respective surveyed tracts are not severable but have unity of title carried by the surveyed tract.

It may be further said that the court order referred to contemplates satisfactory agreements between adjoining owners in the four cases above mentioned in the establishment of the side lines, subject to approval by the Secretary of the Interior. Any such agreements which appear to make an equitable division of the river-bed areas will be acceptable to the Department, in case strict adherence to the method above outlined would not on account of peculiar conditions give the most satisfactory result.

In surveying other Indian allotments, in addition to the four above described, it is deemed advisable in all cases, where possible, to obtain agreement with the adjoining riparian owners in the establishment of the side lines to identify the river-bed areas belonging to the respective parties.

A further observation is deemed appropriate in this connection. These lands, or some of them, have been found to be of great value on account of their oil deposits, and wells have been sunk at large cost. Other tracts not yet developed may also have great prospective value. In the absence of agreement, these side lines of division between claims would be subject to variation by change in the course of the river. In consequence, an oil well put down on a claim near one of these lines might in a short time be found within the limits of an adjoining tract by a slight shift in the course of the river. Such contingency should be guarded against in the agreement by providing that these side lines to be agreed upon shall be the permanent fixed lines between the adjoining claims.

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### ALBERT E. DORFF.

*Decided December 27, 1923.*

#### SCHOOL LAND—COAL LANDS—NEW MEXICO—EVIDENCE—BURDEN OF PROOF.

The grant of certain specified sections of public lands for school purposes made to the State of New Mexico by its enabling act excepted mineral lands, and where, prior to its admission, granted sections had been classified as coal and offered for sale at a fixed price, those sections were *prima facie* not subject to the operation of the grant, but the burden of proof was cast upon the State to establish that the classification was erroneous.

#### SCHOOL LAND—COAL LANDS—NEW MEXICO—LAND DEPARTMENT—PRACTICE.

The Land Department will afford a State an opportunity to protest against any proposed disposal of lands within granted school sections which are alleged not to have passed under its school grant by reason of their mineral character.

## COAL LANDS—OIL AND GAS LANDS—ACT OF FEBRUARY 25, 1920.

The classification of public lands as valuable for coal does not prevent disposition of their oil and gas contents under the provisions of the act of February 25, 1920.

## COURT DECISION CITED AND APPLIED—DEPARTMENTAL DECISIONS DISTINGUISHED.

Case of Washburn v. Lane (258 Fed., 524), cited and applied; cases of State of Utah (32 L. D., 117), Charles L. Ostenfeldt (41 L. D., 265), State of Utah v. Olson (47 L. D., 58), and State of Utah, Pleasant Valley Coal Company, intervener v. Braffet (49 L. D., 212), cited and distinguished.

FINNEY, *First Assistant Secretary*:

Albert E. Dorff has appealed from the decision of the Commissioner of the General Land Office dated July 24, 1923, in so far as said decision rejected his application, filed pursuant to section 13 of the leasing act of February 25, 1920 (41 Stat., 437), for a permit to prospect for oil and gas upon lots 1 and 2, Sec. 2, T. 14 N., R. 8 W., N. M. P. M., Santa Fe, New Mexico, land district.

The plat of survey of the land described was filed November 5, 1894. By order of November 6, 1906, this land was withdrawn from entry, and on September 9, 1910, the land was classified as coal and the price therefor fixed at \$20 per acre for lot 1 and \$15 per acre for lot 2 of said section.

By the act of June 20, 1910 (36 Stat., 557), known as the enabling act, sections 2 and 32 of each township were granted to the proposed State of New Mexico in aid of common schools, in addition to sections 16 and 36 of each township, which had been theretofore granted. This latter grant did not become effective, however, until the State was admitted into the Union by the President's proclamation of January 6, 1912 (37 Stat., 1723), and lands known to be valuable for coal at that date did not pass by this grant. *United States v. State of New Mexico*, on rehearing (48 L. D., 11).

In considering this appellant's claim that lots 1 and 2 of Sec. 2 were not State land because they were coal in character and the United States had a contest pending against the State as to said lots on a charge that they did not pass under the school-land grant, the Commissioner held—

In view of the fact that lots 1 and 2, Sec. 2, are *prima facie* State land \* \* \* the oil and gas application 045586 of Dorff is hereby rejected as to said lots 1 and 2, Sec. 2, \* \* \*.

The appellant now claims that this ruling is erroneous and alleges that the lands were known coal lands and classified as such before the grant to the State became operative and were therefore excepted from said grant. He requests that a prospecting permit be issued to him for said land.

The decision of the Commissioner that the land was *prima facie* State school land and that the appellant only occupied the status of an adverse claimant or contestant and acquired no rights by his application was apparently a finding that the facts in this case bring it within the purview of rule 1 of the circular of instructions approved by the Department March 6, 1903 (32 L. D., 39), which reads:

When a school section is identified by the government survey and no claim is at the date when the right of the State would attach, if at all, asserted thereto under the mining or other public land laws, the presumption arises that the title to the land has passed to the State, but this presumption may be overcome by the submission of a satisfactory showing to the contrary. Applications presented under the mining laws covering parts of a school section will be disposed of in the same manner as other contest cases.

This rule has been cited and applied in numerous decisions, including State of Utah (32 L. D., 117); Charles L. Ostenfeldt (41 L. D., 265); State of Utah *v.* Olson (47 L. D., 58), and in State of Utah, Pleasant Valley Coal Company, intervener *v.* Braffet (49 L. D., 212).

In none of those cases were the lands classified as mineral (coal) at the time when the State's right would have attached, if at all. In this case, prior to the admission of the State and the operation of the grant, the Department had determined that the land was coal in character and had set the price at which said land should be sold under the coal-land laws. Under those conditions it is difficult to perceive how the land may well be held to be *prima facie* State school land acquired under the act of June 20, 1910, *supra*.

As there was, prior to the date when said grant would operate, a formal classification of the land as coal land, the rule stated by the court with respect to lands withdrawn as valuable for petroleum, in the case of Washburn *v.* Lane (258 Fed., 524) that lands so withdrawn are *prima facie* mineral in character, would apply. In considering the effect of a petroleum withdrawal of lands thereafter found, upon survey, to be in school sections granted to the State of Utah under its enabling act, which grant was similar to the grant made to the State of New Mexico, the Department held in State of Utah *v.* Edward Lichliter *et al.* (A-5062), unreported, decided August 18, 1923,<sup>1</sup> that said withdrawal impressed the land with a *prima facie* mineral character which suspended the operation of the grant and placed the burden of proving the nonmineral character of the land upon the State.

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<sup>1</sup> See the reported case of State of Utah *v.* Lichliter *et al.*, on reconsideration, decided January 10, 1924, adhering to the decision of August 18, 1923, page 231.

A like rule must be applied in a case where lands have been classified as coal and offered for sale at a stated price before the grant to the State.

Although the State is not required to perform any acts in order to make the school-land grant effective, nor the Secretary required to approve or certify any lists in order to complete the grant, nevertheless, in order to pass by such grant, the lands must not be known to be valuable for mineral deposits. In this case the land had been classified by the Department, in the exercise of authority vested in it by the Congress and in accordance with published regulations governing such classifications. Regulations approved April 10, 1909 (37 L. D., 653), as amended on June 12, 1909 (39 L. D., 36). Such classification impresses the land with a known mineral character, prior to the grant to the State, and in order to acquire the land under such grant the burden is upon the State to establish that such classification was erroneous. *Prima facie* the lands were not subject to the grant.

As such lands are, by virtue of their classification as coal lands, *prima facie* public lands of the United States and excepted from the grant to the State, they are subject to disposal under the public-land laws.

In such case the State is entitled to notice of any proposed disposal under the public-land laws and an opportunity to protest against such action. If sufficient showing is made to raise an issue as to the mineral character of the land a hearing may be had at which the State will be afforded an opportunity to establish that the lands were not known to be mineral at the time when the grant would have become effective.

Dorff's application for an oil and gas prospecting permit was not a claim inconsistent with the coal classification as the coal deposits would still remain subject to disposal.

In this case it appears that a hearing has been had in a proceeding brought by the Land Department charging that the land was known to be valuable for coal at the date of admission of the State into the Union. In view of this fact action will be suspended upon this application, pending final disposition of the said contest. Thereafter this application will be adjudicated in the light of the facts then shown and in accordance with the views herein expressed.

The Commissioner's decision is modified to conform herewith, and the case is remanded for the action herein directed.

**TIMBER TRESPASS—RULE OF DAMAGES—CIRCULAR NO. 881,  
AMENDED.****INSTRUCTIONS.**

[Circular No. 909.]

DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE,  
*Washington, D. C., December 29, 1923.*

**CHIEFS OF FIELD DIVISIONS:**

Circular No. 881 of March 14, 1923 (49 L. D., 484), is hereby amended by substituting for the second rule announced under the sub-heading **TIMBER**, the following:

2. In case of innocent trespasses neither the trespassers nor their transferees shall be required to pay more than the stumpage value, or the value of the timber in standing trees taken by them, as damages to the Government.

WILLIAM SPRY,  
*Commissioner.*

Approved:

E. C. FINNEY,  
*First Assistant Secretary.*

**SHOSHONE IRRIGATION PROJECT—SUSPENSION OF PUBLIC  
NOTICES AND EXTENSIONS OF TIME FOR MAKING PAYMENTS.**

*Opinion, December 31, 1923.*

**RECLAMATION—WATER RIGHT—NOTICE—APPLICATION—PAYMENT.**

Upon the issuance of public notices pursuant to section 4 of the reclamation act of June 17, 1902, the construction charges specified in the notices become fixed charges against the lands, and the acceptance and approval of water right applications in a sense create a contractual relation between the applicants and the United States for the payment of the charges by the water users and the furnishing of irrigation water by the Government that can not be changed except with the consent of both parties.

**RECLAMATION—NOTICE—SECRETARY OF THE INTERIOR—SUPERVISORY AUTHORITY.**

The Secretary of the Interior has no general statutory authority to suspend, even temporarily, public notices issued by him pursuant to section 4 of the act of June 17, 1902, of lands irrigable under reclamation projects, nor does he possess supervisory power to do so in the absence of a specific statute authorizing it.

**RECLAMATION—WATER RIGHT—PAYMENT—SECRETARY OF THE INTERIOR—  
SUPERVISORY AUTHORITY.**

Except where specifically authorized by law, the Secretary of the Interior is not empowered to grant extensions of time, either directly or indirectly, for the payment of charges accruing from individual water users upon reclamation projects.

RECLAMATION—WATER RIGHT—PAYMENT—FORFEITURE—SECRETARY OF THE INTERIOR—SUPERVISORY AUTHORITY.

Inasmuch as the acts of June 17, 1902, and August 13, 1914, did not peremptorily declare in mandatory language that forfeitures *must* be declared, or that they will necessarily result by operation of law as soon as defaults in payments by water users on reclamation projects have occurred, it rests within the sound discretion of the Secretary of the Interior to determine whether an entryman may thereafter be permitted to cure the default by payment of the charges.

COURT DECISION APPLIED—DEPARTMENTAL DECISIONS ADHERED TO.

Case of *Swigart v. Baker* (229 U. S., 187), cited and applied; cases of *Morris Collar* (13 L. D., 339), *Theodore A. Sloane* (22 L. D., 210), *Milne v. Thompson* (25 L. D., 501), *Maurice E. Goldberg* (40 L. D., 509), and *Marquis D. Linsea* (41 L. D., 86), cited and adhered to.

EDWARDS, *Solicitor*:

A recommendation by the Commissioner of Reclamation for the suspension of the public notices relating to the Frannie Division of the Shoshone Irrigation Project and the operation of that division on a rental basis pending a complete reclassification and a reformation of the farm units is now before me for consideration as to the legality of such an action.

The principal question thus presented is as to whether the Secretary of the Interior has the power under the law to order such a suspension, and as an incident thereto arises, the further question as to his authority to grant extensions of time for the payment of reclamation charges.

A full appreciation and understanding of these legal questions make it worth while to inquire first into and note the office and effect of public notices issued under the reclamation act.

The original reclamation act of June 17, 1902 (32 Stat., 388), authorizes the Secretary of the Interior to withdraw, examine and determine the irrigability of public lands. Section 4 of that act provided that upon his favorable determination as to any particular area—

\* \* \* he may cause to be let contracts for the construction of the same, in such portions or sections as it may be practicable to construct and complete as parts of the whole project; \* \* \* and thereupon he shall give public notice of the lands irrigable under such project, and limit of area per entry, \* \* \* also of the charges which shall be made per acre upon the said entries, and upon lands in private ownership which may be irrigated by the waters of the said irrigation project, and the number of annual installments, \* \* \*.

It will be observed that that act did not withhold any lands from entry except such as were intended for use in connection with the construction, operation and maintenance of irrigation projects; and it did not state at what time after the letting of the contracts mentioned, the

public notice should be given, or give that notice any particular effect further than to prescribe the area of enterable units, known as farm units, and fix the charges to be paid by water users to reimburse the Government for funds expended by it in the construction, operation, and maintenance of the projects. Entries were consequently formerly allowed under that act at any time either before or after the completion of projects; but the law was later changed by the acts of June 25, 1910 (36 Stat., 835), and February 18, 1911 (36 Stat., 917), which in effect withdrew all lands within all irrigation projects from entry until the issuance of the public notice. This change in the law gave such notices much more important effects than they formerly had in that their issuance constituted the legal procedure under which the Secretary restores lands to entry and names specific dates on which applications for entry and for water rights may be presented and received.

Upon the issuance of such notices the construction charges specified therein became fixed charges against the lands (Instructions, 36 L. D., 256; *Swigart v. Baker*, 229 U. S., 187), and the acceptance and approval of the water-right applications in a sense create a contractual relation between the applicants and the United States for the payment of the charges by the water users and the furnishing of irrigation water by the Government—a relationship which can not be changed except by a consent of both the user and the Government. See Section 4, act of August 13, 1914 (38 Stat., 686).

In this connection it is well to here note the fact that the law requires the payment of reclamation charges to be made annually after the issuance of public notice and the allowance of water-right applications, and prescribes penalties for defaults in such payment. The law is mandatory in its requirements that all these charges shall be paid; and it has not given the Secretary of the Interior any power to excuse payments or remit the charges, except that he may grant an extension of time for certain payments under the acts hereinafter mentioned.

In view of the fact that these public notices form the administrative basis for the relationship between the Government and water users; and also of the further fact that the suspension of the notices now proposed will temporarily sever that relationship and relieve the users for a time at least from continuing to meet the obligations of payment imposed by the law, it seems extremely doubtful as to whether such suspensions as the one here involved can be ordered in the absence of a statute expressly authorizing the Secretary to make them.

I find nothing in section 441, Revised Statutes, or in section 10 of the act of 1902, *supra*, or section 15, act of August 13, 1914, *supra*,

conferring general authority on the Secretary of the Interior which justifies the conclusion that he can order such suspensions through the exercise of his supervisory power. And the fact that he does not possess that power independent of specific statute appears to have been recognized by Congress when it passed the act of February 13, 1911 (36 Stat., 902), which specifically conferred on him the power to withdraw public notices issued before that date, and also authorized him to agree to modifications of then existing water rights in the following language:

That the Secretary of the Interior may, in his discretion, withdraw any public notice heretofore issued under section four of the reclamation Act of June seventeenth, nineteen hundred and two, and he may agree to such modification of water-right applications heretofore duly filed or contracts with water users' associations and others, entered into prior to the passage of this Act, as he may deem advisable, or he may consent to the abrogation of such water-right applications and contracts, and proceed in all respects as if no such notice had been given.

The well-settled rules of statutory construction justify the assumption that Congress recognized the fact that the issuance of a public notice created and fixed a status in the relationship between water users and the Government which could not be changed by the Secretary in the absence of a statute authorizing him to do so. And it certainly supports the conclusion that in the opinion of Congress the Secretary did not have the power to withdraw and terminate public notices already given, and it was for that reason that Congress deemed it necessary to pass that act giving him the power to make such withdrawals. To hold otherwise would be to say that that act was not needed and Congress can not be presumed to enact a useless and unnecessary law.

If that act had been mandatory in its provisions the conclusion I have just announced would not necessarily follow, because in that case the act may very well be said to be a command on the part of Congress that the Secretary make the withdrawal of the notice under existing powers; but the act is not mandatory, it is merely directory, and says that "the Secretary of the Interior may, in his discretion" withdraw such notice—thus indicating a clear purpose on the part of Congress to confer a new power rather than to direct the exercise of an existing one.

As a further illustration of this limitation on the powers of the Secretary to undo a thing that he has already done in the issuance of a public notice I call your attention to the act of April 16, 1906 (34 Stat., 116), section 1 of which authorizes the surveying of lands within reclamation projects into town lots. Section 2 of that act provides—

That the lots so surveyed shall be appraised under the direction of the Secretary of the Interior and sold under his direction at not less than their appraised value at public auction to the highest bidders, from time to time, for

cash, and the lots offered for sale and not disposed of may afterwards be sold at not less than the appraised value under such regulations as the Secretary of the Interior may prescribe.

Later, and after lots had been appraised under that act and remained unsold, this Department thought it necessary to ask Congress to clothe the Secretary with power to reappraise the unsold town lots, and the act of June 11, 1910 (36 Stat., 465), specifically conferring that power, was enacted in response to that request.

It can not be said that the act of February 13, 1911, *supra*, would justify even a temporary withdrawal or suspension of the public notices now under consideration, because that act relates only to such notices as were existing at the date of its passage in 1911, and does not affect or justify the withdrawal of notices issued since that date as were all the notices in this case, which are four in number and were issued in 1917, 1919, 1920 and 1921, respectively.

My attention has been called to an instance—the unpublished action of November 11, 1912—in the case of P. J. Quesinberry, in which a public notice was suspended as to one particular claim. The notice under which his rights were initiated was, however, issued prior to the passage of the act of 1911.

While the act of 1911, relates to withdrawals rather than to suspensions of public notices, such as is now contemplated, the relationship established between the Government and water users by such notices, and the drastic requirements of the law for the continuous annual payment of reclamation charges seem to justify the conclusion that the Secretary is without power even temporarily to suspend those relations and the requirements as to the payments by the issuance of an order of suspension; and this is especially true in the present case in which one of the reasons for the suspension seems to be the relief of the water users from the payment of annual installments which are said to be unusually burdensome, and amounted last year on an average to 71 per cent of the total value of the crops produced on the lands affected.

It is an incontrovertible fact that the Secretary of the Interior is without power to remit these payments, which have become fixed charges against the land; and it is equally true that there is no statute which explicitly authorizes him to grant extensions of time for payment of charges due from individual water users to the Government, except such charges as became due prior to December 31, 1922, which may, in proper cases, be extended by him to, but not beyond December 31, 1924, under the acts of March 31, 1922 (42 Stat., 489), and February 28, 1923 (42 Stat., 1324). And if the law does not authorize the Secretary to grant extensions of time for a definite period by his direct act, it can hardly be said that

he could legally do so by indirection, through a suspension of the public notices in this instance.

It is true that after individual water users have become members of, and been merged into public corporations known as irrigation districts, the relationship of debtor and creditor between them and the Government ceases, and they are no longer required to pay their charges direct to the Government. In such an instance the Secretary of the Interior may, for the reasons given in my opinion of September 29, 1923 (50 L. D., 142), enter into contracts fixing the dates of the payment of charges. It is also a fact that under the act of February 13, 1911 (36 Stat., 902), quoted above, the Secretary may enter into contracts with water users' associations and others "for the modification of water-right applications" filed before the passage of that act; but there is no statute other than that act and the acts of March 31, 1922, and February 28, 1923, *supra*, which confer on the Secretary the power to grant extensions of time for the payment of charges. Nor is there any other way in which water users may be legally excused for definite lengths of time from making such payments except that it is provided in section 5 of the act of February 28, 1923, *supra*, that in cases where an individual water user or individual applicant for water-right—

\* \* \* is unable to pay any construction or operation and maintenance charge due, excepting operation and maintenance charges for drainage on the Boise, Idaho, project for the year 1922, or prior thereto, the Secretary of the Interior is hereby authorized in his discretion to add such accrued and unpaid charges to the construction charge of the land of such water user or applicant, and to distribute such accumulated charges equally over each of the subsequent years, beginning with the year 1924, at such rate per year as will complete the payment during the remaining years of the twenty-year period of payment of the original construction charge: *Provided*, That upon such adjustment being made, any penalties or interest which may have accrued in connection with such unpaid construction and operation and maintenance charges shall be canceled, and in lieu thereof the amount so due, and the payment of which is hereby extended, shall draw interest at the rate of 6 per centum per annum, paid annually, from the time said amount became due to date of payment.

The passage of the acts of March 31, 1922, and February 28, 1923, *supra*, expressly giving the Secretary power to grant extensions of particular payments, must for the reasons I have given in connection with my interpretation of the act of February 11, 1911, *supra*, be taken as a congressional recognition of the fact that the Secretary does not have the power to grant extensions of time except when specifically authorized to do so, and this Department has never undertaken to grant, or claim the power to grant extensions of time for payments under laws of any kind through the exercise of the supervisory power conferred by section 441, Revised Statutes, and it has

not in any instance made such extensions except when they have been specifically authorized by statute and has refused to do so in the absence of such statutes as will be seen from its decisions in the cases of Morris Collar (13 L. D., 339), Theodore A. Sloane (22 L. D., 210), and Maurice E. Goldberg (40 L. D., 509). And in its unpublished decision of April 22, 1909, it expressly declared that extension of time for the payment of reclamation charges could not be granted under the law as it then stood.

*Leniency has been shown*, however, in the matter of enforcing forfeitures for nonpayments, and it has been held that defaults may be cured by tardy payments. See Morris Collar, *supra*, and Milne v. Thompson (25 L. D., 501).

It will be observed from the pertinent provisions of the acts of June 17, 1902, and August 13, 1914, quoted above, that Congress did not peremptorily declare in mandatory language that forfeitures *must be declared*, or that they will necessarily result by operation of law as soon as defaults in payments have occurred. All that was said in those acts was that water rights and entries "shall be subject to cancellation" and moneys already paid to forfeiture, and in construing the act of 1902, this Department said in speaking of the default of Marquis D. Linsea (41 L. D., 86, 88):

It is not imperative that it should be canceled or a forfeiture declared. It rests within the sound discretion of the Secretary of the Interior as to whether the entryman may thereafter be permitted to cure such default by payment of the water charges, if he or she has continued to comply with the provisions of the homestead law.

In that case the entry had been canceled and a forfeiture declared and this Department by its decision reversed the action of the General Land Office in denying Linsea's application for its reinstatement on the recommendation of the Reclamation Service that it be not granted.

In reaching the conclusion I have announced as to the Secretary's lack of authority to grant extensions of time I am not unmindful of the fact that First Assistant Secretary Adams, on November 11, 1912, approved the existing Reclamation Service order No. 221 which reads in its parts here pertinent, as follows:

Water users on reclamation projects whose growing crops are damaged or destroyed by hail and who for this reason are unable to make payment of the building charges under the reclamation law, which would become delinquent at the time the next installment thereof became due, may, in the discretion of the Secretary, be allowed a postponement of such charges, but no such postponement shall be for more than one year or extend beyond the 10 or 20 year annual payment period, the time within which the water-right charges are required to be paid.

While that order terms the indulgence provided for in it as a "postponement" of the payments it is in effect nothing more than an attempt to provide for an extension of time for definite periods; and I am unable to find any justification for such an order in the words of any statute. If its issuance can be justified at all it would be on the ground that the postponement or delay in the payments were to be granted through the exercise of leniency or forbearance to which I have just referred, and that leniency has not heretofore been granted for the reasons mentioned in that order in any similar class of cases, except by expressed provisions of statutes.

The requirements of residence under the homestead and preemption laws were no more drastic or mandatory than are the requirements for prompt annual payments under the reclamation law, and Congress has thought it necessary in frequent instances that it enact legislation to give relief to embarrassed homesteaders and preemptors as will be seen from the following statutes temporarily excusing residence: The act of July 1, 1879 (21 Stat., 48), where crops were destroyed or seriously injured by grasshoppers; section 3, act of March 2, 1889 (25 Stat., 854), where settlers were unable to support themselves or those dependent on them, by reason of total or partial destruction or failure of crops, sickness or other unavoidable casualty; and in numerous other statutes to be found in 39 Stat., 341, 40 Stat., 430, 41 Stat., 271 and 288; and in other similar statutes.

And Congress thought it necessary to pass the act of June 25, 1910 (36 Stat., 864), to excuse residence even under reclamation homestead entries covering lands for the irrigation of which the Government was not able expeditiously to furnish water. It was also thought necessary to enact section 5 of the act of June 27, 1906 (34 Stat., 519, 520), to excuse desert-land entrymen from making expenditures or attempting reclamation during the time they were hindered, delayed or prevented from complying with the law by the Government's proceedings under the reclamation act.

If the Secretary already had the power to grant the relief accorded by those numerous statutes then their enactment was unnecessary and Congress did needless and useless things in passing them.

In conclusion, and by way of recapitulation I have the honor to inform you that in my judgment, the Secretary of the Interior is not legally authorized to issue the proposed order, and that there is no law empowering him to grant extensions of time, either directly or indirectly, for the payment of reclamation charges accruing from individual water users since December 1, 1922.

Approved:

E. C. FINNEY,

*First Assistant Secretary.*

## STATE OF UTAH v. LICHLITER ET AL. (ON RECONSIDERATION).

Decided January 10, 1924.

## WITHDRAWAL—OIL AND GAS LANDS—LAND DEPARTMENT—EVIDENCE.

The practice of withdrawing lands contemplates their segregation for purposes of investigation and it is clearly the duty of the Land Department to seek such withdrawals whenever from evidence before it an inference or belief is warranted that lands are in fact mineral.

## SCHOOL LAND—RESERVATION—WITHDRAWAL—OIL AND GAS LANDS—UTAH—STATUTES.

The language used in the proviso to section 6 of the enabling act of July 16, 1894, which excepted from the grant of public lands to the State of Utah for school purposes, those lands embraced in "Indian, military, or other reservation of any character," is sufficient to show an intention of including within its exception areas withdrawn for their prospective oil and gas values.

## SCHOOL LAND—OIL AND GAS LANDS—MINING CLAIM—MINERAL LANDS—VESTED RIGHTS—WORDS AND PHRASES—STATUTES.

The term "valid claims" as used in section 37 of the act of February 25, 1920, relates to unperfected claims to mineral lands and does not contemplate a completed grant of nonmineral lands to a State in aid of its common schools.

## SCHOOL LAND—OIL AND GAS LANDS—MINERAL LANDS—SURVEY—WITHDRAWAL.

Where mineral lands are excepted from a grant of public lands for school purposes, a petroleum withdrawal prior to survey has the effect of stamping the lands as *prima facie* mineral in character and, upon the approval of the survey, suspends the operation of the grant.

## SCHOOL LAND—OIL AND GAS LANDS—WITHDRAWAL—SURVEY—EVIDENCE—BURDEN OF PROOF.

A petroleum withdrawal prior to survey of lands which, upon survey, are identified as lands granted to a State for school purposes, if nonmineral, has the effect of casting the burden of proof upon the State to produce evidence sufficiently convincing to warrant their nonmineral classification.

## OIL AND GAS LANDS—WITHDRAWAL—PROSPECTING PERMIT—LEASE.

A petroleum withdrawal prior to the act of February 25, 1920, of unproven lands for the purpose of classification, was not extinguished by the passage of that act, inasmuch as the prospecting for oil and gas thereunder was intended merely as preliminary to leasing and not as a method of disposal, they being only subject to lease upon discovery of their value for mineral deposits.

## SCHOOL LAND—OIL AND GAS LANDS—WITHDRAWAL—SURVEY—HEARING—EVIDENCE—BURDEN OF PROOF.

Where objection is made to a ruling by the Commissioner of the General Land Office that a petroleum withdrawal of lands which, upon subsequent survey, are found to be school sections, is sufficient to prevent the title from passing to the State upon the approval of the survey, determination of that point in order to fix the burden of proof and the necessity for a hearing should be insisted upon by the State before a hearing is had, otherwise proceeding with the hearing will be construed as an election to accept the ruling.

FINNEY, *First Assistant Secretary*:

By decision in the above-entitled case, the Department, on August 18, 1923, affirmed the decision of the Commissioner of the General Land Office, which sustained the local officers and dismissed protests by the State of Utah against the issuance of prospecting permits, pursuant to section 13 of the leasing act of February 25, 1920 (41 Stat., 437), to the following applicants: Edward Lichliter, Jesse C. Brandon, Jesse W. Johnson, Charles A. Quigley, William S. McCarthy, William H. Foley, H. W. Prickett, Arthur C. Sullivan, Isaac A. Smoot, W. J. Cooper, W. A. Stuart, and Grant L. Baker.

The lands involved were Secs. 2, 16, and 36, T. 40 S., R. 18 E., Secs. 16, 32, and 36, T. 40 S., R. 19 E., Sec. 2, T. 41 S., R. 17 E., Secs. 2 and 16, T. 41 S., R. 18 E., Sec. 2, lots 1, 2, 3, and 4, Sec. 36, T. 41 S., R. 19 E., S. L. M., Salt Lake City, Utah, land district, and were claimed by the State as school land inuring to it by virtue of the grant in section 6 of the enabling act of July 16, 1894 (28 Stat., 107), of sections 2, 16, 32, and 36, of each township, in aid of the common schools of said State.

The same question was presented in the case of *State of Utah v. Edward Lichliter* (unreported), involving Sec. 32, T. 22, S., R. 13 E., S. L. M.; and the appellant having filed one brief in support of its appeals in both cases, the Department, in affirming the decision of the Commissioner, cited as controlling the views expressed by it in its decision of the same date in the case involving Sec. 32, T. 22 S., R. 13 E., *supra*.

Upon requests of counsel for the State, the Department granted stays of its decisions in both cases, until January 15, 1924, within which the State could file motions for rehearings. During this period, on December 24, 1923, the Executive order creating Petroleum Reserve No. 25, Utah, was revoked by the President of the United States, as to 421,723 acres of land, which included Sec. 32, T. 22 S., R. 13 E., S. L. M., but not the land involved herein. This changed status of the land prompted the Department to vacate its decision in the case of *State of Utah v. Edward Lichliter supra*, as it still had the matter before it for consideration, and on December 26, 1923, said decision was vacated. It now becomes necessary to reconsider this case and to render a separate decision therein.

The lands involved were included in a temporary petroleum withdrawal made by the Secretary on October 4, 1909, and were included in Petroleum Reserve No. 7, by Executive order of July 2, 1910. By further Executive order of August 25, 1910, the temporary withdrawal of October 4, 1909, was ratified.

The township plats identifying all of the lands involved were each approved by the surveyor general on June 19, 1911, and by the Com-

missioner of the General Land Office on March 28, 1912, and May 24, 1912.

Applications for oil and gas prospecting permits for the sections involved were filed by the appellees.

The State had filed protests in numerous cases against the issuance of prospecting permits for sections designated in the enabling act as school sections, and in July, 1921, the Commissioner instructed the local officers to allow the State an opportunity to procure the rejection of permit applications for sections claimed to have been granted to it, in aid of common schools, where the establishing of such sections and the possible attaching of the State's right were preceded by a petroleum reservation, by showing, at a hearing, that the lands were not valuable for oil or gas.

A hearing was had, upon a consolidation of these cases, pursuant to the foregoing instructions, and an appeal has been filed by the State from the decision of the Commissioner affirming the finding of the local officers that it failed to establish that the lands were not valuable for oil or gas.

The evidence introduced at this hearing showed that the lands lie north of the San Juan River in southeastern Utah; that, prior to the approval of the survey of said lands, some twenty-five or thirty wells had been drilled; and that small quantities of oil had been discovered in about three-fourths of them. Considerable conflicting testimony was introduced as to whether these discoveries were of oil in commercial quantities, and there was considerable divergency of expert opinion as to where oil would most probably be discovered, whether in a syncline or in one of two anticlines which extended in a northerly-southerly direction and underlaid the land involved, the syncline being chiefly beneath ranges 18 and 19, east.

While it was contended that there were no actual discoveries of oil upon any of the land involved, and it was claimed that the deep canyon of the San Juan River had furnished an outlet for the oil in all the sands above its floor, nevertheless the witnesses for the State admitted that other oil sands known to outcrop elsewhere in the vicinity probably underlaid the lands in question, and that the only satisfactory means of testing the sands was by deeper drilling, the deepest well known having reached only around 1,500 feet. The testimony as to the amount of oil actually discovered was conflicting, and by no means persuasive that the wells containing oil represented either an adequate test of the sands penetrated or disproved the existence of other oil-bearing sands in lower strata.

The reservation was made as a result of investigations by the Geological Survey, the results of which were published in 1909 and 1910 (Bulletins 431 and 471), and were extensively quoted by both the State and the appellees. The existence of eight known oil sands

underlying the field, all of which have not been adequately tested, was reported at that time, nor does it appear that subsequent developments have as yet included such drilling operations as would conclusively satisfy the requirements of the tests indicated in said reports as necessary to a final determination as to the scope and value of the territory as oil lands. The same geologic indications which prompted the reservation in 1910 to-day exist, nor can it well be said that such withdrawals must be based upon more than reasonable geologic inferences. Such practice was cited with approval by the Supreme Court in the case of the Diamond Coal and Coke Company *v.* United States (233 U. S., 236), where the *known* mineral character of coal lands was held to be established by an inference that because of certain outcropping deposits on other land these same veins or strata of coal extended under the land in question. The similarity of deposition of oil-bearing sands and coal deposits leaves no doubt as to the applicability of the rule therein stated to lands apparently underlain with oil sands. In the case of withdrawals for *classification* inferences are essential. Demonstrations of the existence of minerals by evidence additional to geologic inferences would reasonably prompt an immediate and final mineral classification. The practice of withdrawing lands contemplates their segregation for purposes of investigation, and it is clearly the duty of the Department to seek such withdrawals wherever, from evidence before it, an inference or belief is warranted that lands are in fact mineral.

In this case a petroleum reserve was created on evidence *prima facie* establishing the mineral character of the land. Washburn *v.* Lane (258 Fed., 584). A party interested in challenging this conclusion properly assumes the burden of overcoming a *prima facie* case.

Appellant's appeal is based almost entirely upon a claim that the Commissioner erred in holding that the burden of proving that the lands had no value for oil or gas was upon it. The appellant submits that the correct rule should be that the burden was upon the Government and the permit applicant to show that the lands were known to be mineral in character when the State's rights attached, if at all, that is, upon approval and acceptance of the plat of survey. It is not seriously contended that the evidence adduced at the hearing establishes that the land has no prospective value for oil or gas, and careful consideration of the testimony convinces the Department that the geologic conditions warrant prospecting operations upon the land involved herein.

There remains only the question whether a petroleum withdrawal of lands which, upon subsequent survey, are found to be one of the

sections granted to the State by its enabling act in aid of common schools is sufficient to prevent the title to said land from passing to the State at that time. A determination of this question, in order to fix the burden of proof and the necessity for a hearing, should have been insisted upon by the State before the hearing was had; and its election to proceed with the hearing as ordered by the Commissioner is, technically, an acceptance of his ruling on that point and entitles the State to no further hearing on the question.

In view, however, of the importance of a ruling on this point in aiding in the proper disposition of numerous other protests filed by the State under these same conditions, the claim of appellant, on that point, will receive consideration.

Section 6 of the enabling act approved July 16, 1894 (28 Stat., 107), is as follows:

That upon the admission of said State into the Union, sections numbered two, sixteen, thirty-two, and thirty-six in every township of said proposed State, and where such sections or any parts thereof have been sold or otherwise disposed of by or under the authority of any Act of Congress other lands equivalent thereto, in legal subdivisions of not less than one quarter section and as contiguous as may be to the section in lieu of which the same is taken, are hereby granted to said State for the support of common schools, such indemnity lands to be selected within said State in such manner as the legislature may provide, with the approval of the Secretary of the Interior: *Provided*, That the second, sixteenth, thirty-second, and thirty-sixth sections embraced in permanent reservations for national purposes shall not, at any time, be subject to the grants nor to the indemnity provisions of this Act, nor shall any lands embraced in Indian, military, or other reservations of any character be subject to the grants or to the indemnity provisions of this Act until the reservation shall have been extinguished and such lands be restored to and become a part of the public domain.

Although this act did not expressly except mineral lands from its operation, the Supreme Court has held that such lands did not pass thereunder. *State of Utah v. Sweet* (245 U. S., 563); see also *State of Utah v. Allen et al.* (27 L. D., 53); *State of Utah* (32 L. D., 117). It is well settled that the right of a State under a grant of this kind does not attach until the specified section has been identified by survey, and that a withdrawal of said land for military and other special purposes prior thereto suspends the operation of such grant, upon approval of a survey of said sections: *Ham v. Missouri* (18 How., 126); *Beecher v. Wetherby* (95 U. S., 517); *Heydenfeldt v. Daney Gold and Silver Mining Co.* (93 U. S., 634); *Mining Company v. Consolidated Mining Co.* (102 U. S., 167); *State of Utah* (29 L. D., 418).

It is urged by the State that a withdrawal of lands as valuable for oil and gas, and in aid of legislation, is not a *permanent* reservation and that the title of the State attaches, upon survey, unless

the lands are known to contain mineral deposits. This claim ignores the portion of section 6 of the enabling act which reads—

nor shall any lands embraced in Indian, military, or other reservations of any character be subject to the grants or to the indemnity provisions of this Act until the reservation shall have been extinguished and such lands be restored to and become a part of the public domain.

This provision clearly shows that temporary, as well as permanent, reservations were contemplated by the statute.

The practice of withdrawing land in aid of legislation, in cases where danger of great loss to the general public was threatened by the permitting of lands found to be mineral in character to be acquired through defects in existing laws, was exercised long prior to the admission of the State of Utah into the Union; and said practice was long acquiesced in by Congress, and approved as a power in the Chief Executive to be exercised in the protection of the public domain from improper acquisition. The act of June 25, 1910 (36 Stat., 847), pursuant to which the land now involved was withdrawn, was formal congressional recognition of this power and was intended as a limitation thereof rather than a grant of greater authority. *United States v. Midwest Oil Co.* (236 U. S., 459). Congress must, therefore, be presumed to have known of the practice of making temporary withdrawals and reservations similar to those of October 4, 1909, and July 2, 1910, *supra*, and to have intended to include them in the expression—"other reservations of any character"—in section 6 of the enabling act.

No reason is shown by appellant, nor is any perceived by the Department, why this safeguard of the public domain should have been intended by Congress to be abandoned in behalf of the State. On the contrary, it seems clear from the portion of the act last hereinbefore quoted, that such safeguard was intended to be preserved intact, and that the State's title could not attach until the reservation was extinguished.

It is claimed by the State that the passage of the leasing act of February 25, 1920, *supra*, terminated the reservation, and that thereupon the State's right attached, and that these named sections were excepted from the operation of said act by virtue of the State's "valid claim," within the purview of section 37 of the leasing act. The pertinent portion of that section is as follows:

That the deposits of coal, phosphate, sodium, oil, oil shale, and gas, herein referred to \* \* \* shall be subject to disposition only in the form and manner provided in this act, except as to valid claims existent at the date of passage of this act and thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under such laws, including discovery.

The leasing act provides for the leasing of public lands known to contain deposits of oil or gas, and for the granting of permits to prospect for such deposits in unproven territory.

Examination of the order of reservation of the sections now claimed by the appellant, shows that said lands were withdrawn by the President, on July 2, 1910, from settlement, location, sale, or entry, and reserved for *classification* and in aid of legislation affecting the use and disposal of petroleum lands belonging to the United States.

As to lands subject to prospecting permit under the leasing act, it is clear that the prospecting feature is not a mode of disposition, but is a preliminary to leasing. Such leasing constitutes a method of disposal, not of the land, but of the reserved deposits of oil or gas.

It is at once apparent that, as to unproven lands, the purpose of the withdrawal as to classification of the land has not been served by the mere passage of the leasing act, and equally that, as to lands known to contain valuable deposits of oil, or gas, the State could acquire no title. *State of Utah v. Sweet, supra*. Section 37 relates to unperfected claims to *mineral* lands under the mining laws and obviously does not contemplate a completed grant of nonmineral lands to a State, in aid of its common schools.

The provisions of section 2274, Revised Statutes, as amended by the act of February 28, 1891 (26 Stat., 796), which authorized a State to select lands in lieu of school sections which were known to be mineral, or included in any Indian, military, or other reservation, were extended to the State of Utah by the act of May 3, 1902 (32 Stat., 188). Said section of the Revised Statutes also provides that a State may await the extinguishing of an Indian, military, or other reservation before seeking satisfaction of its grant, thereby indicating an intent to include temporary withdrawals for classification as well as withdrawals for use of certain groups or agencies of the Government.

In the decision from which this appeal is filed, the Commissioner afforded the State an opportunity to procure the extinguishing of the reservation. The Department has held on numerous occasions that the effect of a petroleum reservation is to stamp the land as *prima facie* mineral in character (see also *Washburn v. Lane*, 258 Fed., 584). The condition prescribed by the Commissioner for the extinguishing of the petroleum reserve, as to the sections involved, was that appellant satisfy the Department that the land should be classified as nonmineral, i. e., that the inference drawn from the geologic data which prompted the reserve can no longer be regarded as correct. In view of the provisions of the leasing act for prospecting operations, evidence sufficient to warrant a classification of the

land as nonmineral must be convincing that the land does not offer a favorable opportunity for prospecting operations. When such a classification can be made, the purposes of the reservation have been served and the reserve may be extinguished, and the State's right can thereafter attach.

It is held, therefore, that the State was properly required to assume the burden of proving that the land had no value for oil or gas, and, as the evidence introduced leads to the opposite conclusion, the Commissioner's decision is affirmed.

### **OIL AND GAS PROSPECTING PERMITS AND LEASES EMBRACING LANDS WITHIN EXECUTIVE ORDER INDIAN RESERVATIONS— ADDITIONAL REQUIREMENTS.**

#### **INSTRUCTIONS.**

DEPARTMENT OF THE INTERIOR,  
*Washington, D. C., January 14, 1924.*

#### **THE COMMISSIONER OF THE GENERAL LAND OFFICE:**

By letter dated January 7, 1924 ("A" CAO), you requested instructions regarding the insertion of appropriate stipulations in prospecting permits and subsequent leases issued pursuant to the general leasing act of February 25, 1920 (41 Stat., 437), where the lands involved lie within Executive order Indian reservations.

It having heretofore been decided that the act referred to applies to lands of the character indicated (49 L. D., 139), the matter now here consists simply of the additional requirements to be demanded of permittees and lessees deemed necessary for the protection of the Indians. To that end it is hereby ordered that the standard form of preliminary permits and of leases hereafter issued under the act mentioned, for lands within Indian reservations created by Executive order shall contain a clause reading substantially as follows:

That the permittee (or lessee as the case may be), his agents or employees, will not deprive the Indians of the right to any water heretofore used by them; will not commit or suffer any waste to be committed upon lands actually occupied or used by the Indians; will not interfere with the personal or property rights of the Indians in any other respect; will not obstruct any road or trail now in use on the reservation without permission from the officer in charge being first had and obtained; will abide by all the laws relating to trade and intercourse with the Indians, including the introduction of intoxicating liquors into the Indian country, and that in the employment of labor he will give preference, wherever practicable, to Indians who may be able and willing to perform the kind of work required, retaining on the reservation no employees whose conduct proves to be detrimental to the welfare of the Indians.

E. C. FINNEY,  
*First Assistant Secretary.*

# EARL E. BAUGHN AND CHARLES LORD. *See 49140442*

*Decided January 14, 1924. See Page 486*

## ISOLATED TRACTS — OCCUPANCY — HOMESTEAD ENTRY — APPLICATION — PUBLIC LAND.

Public land occupied by one under claim of title is not subject to entry by another, and an application to make homestead entry of such tract will not defeat the right of the occupant to acquire title under section 2455, Revised Statutes, which authorizes the sale of isolated tracts, or under any other applicable public land law.

## COURT AND DEPARTMENTAL DECISIONS CITED AND APPLIED.

Cases of *Atherton v. Fowler* (96 U. S., 513), *Lyle v. Patterson* (228 U. S., 211), *Krueger v. United States* (246 U. S., 69), *Denee v. Ankeny* (246 U. S., 208), *Jones v. Arthur* (28 L. D., 235), and *Burtis v. Kansas* (34 L. D., 304), cited and applied.

## FINNEY, *First Assistant Secretary*:

Earl E. Baughn has appealed from a decision of the Commissioner of the General Land Office dated October 2, 1923, rejecting his application for the offering at public sale under section 2455, Revised Statutes, of the "west fractional half of NW.  $\frac{1}{4}$ ," Sec. 1, T. 1 S., R. 4 E., Mich. Mer., Michigan.

The application was filed February 23, 1921. Under date of October 7, 1922, a special agent of the General Land Office submitted a report of a field investigation, as follows:

The plat on file in the Marquette office shows the corrected map filed in 1849, and the N.  $\frac{1}{2}$  of Sec. 1 a strip 14.85 chains wide on the west end and 17.00 chains on the east end. Thus the N.  $\frac{1}{2}$  of Sec. 1 is only the fractional S.  $\frac{1}{2}$  N.  $\frac{1}{4}$ , and W.  $\frac{1}{4}$  of this fraction is given as 30.14 acres. Further, the map of record shows a lake, not meandered, and all the fractional NW.  $\frac{1}{4}$  of Sec. 1 is shown in the lake (now called Portage Lake). Mr. Baughn's mother owns the land adjoining the fractional W.  $\frac{1}{2}$  NW.  $\frac{1}{4}$ , both on the west and north, and apparently until lately supposed she owned to the lake shore. Recent local surveys, however, show less than one acre in Sec. 1 which extends about half way across their land in Sec. 2 (the fractional part of NE.  $\frac{1}{4}$ ), and Baughn communicated with the Marquette land office relative to acquisition of same. \* \* \* Not being able to obtain reply by correspondence, Mr. Baughn made a trip to Marquette and was informed that an isolated tract application segregated the land, and therefore filed such application. \* \* \* The SW.  $\frac{1}{4}$  NW.  $\frac{1}{4}$  is a small piece of low land, mostly under water in spring, used for pasture, and has only a half dozen small scrub trees on one end, and of absolutely no value as timber. This lake is, however, a summer resort, and lots are selling for about \$25 a front foot. This tract when filled in will sell for at least \$1,000, and has a sale value of \$500 in its present condition. The question of fill is, however, the main point, as Baughn owns all adjoining land, and it would be expensive for another to haul material from a distance.

Under all the above conditions it seems advisable to set a minimum price of \$300 on this strip of about an acre, or \$10 per acre, based on 30.14 acres shown in the fractional SW.  $\frac{1}{4}$  NW.  $\frac{1}{4}$ , Sec. 1, and allow the land to be sold at auction as an isolated tract.

*Privilege to enter must be preserved with  
L. P. Licence 3720238; 3314508*

The decision appealed from rejected Baughn's application because on July 30, 1923, Charles Lord applied to amend his homestead entry, made February 9, 1923, for NE.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , said Sec. 1, to describe the SW.  $\frac{1}{4}$  NW.  $\frac{1}{4}$ , said Sec. 1, the tract originally entered having been patented to one Kercheval.

In Baughn's application he alleged that the tract was not occupied except by himself. That the tract was actually occupied by Baughn is set forth in the report of the field investigation heretofore quoted.

If the tract involved was occupied by Baughn under claim of title, it was not subject to homestead entry. *Jones v. Arthur* (28 L. D., 235), *Burtis v. Kansas* (34 L. D., 304), *Atherton v. Fowler* (96 U. S., 513), *Lyle v. Patterson* (228 U. S., 211), *Krueger v. United States* (246 U. S., 69), *Denee v. Ankeny* (246 U. S., 208).

Lord will therefore be required to show cause, if any there be, why his application to amend should not be denied and Baughn afforded an opportunity to indicate that he still desires to have the tract offered at public sale or that he will acquire title under an applicable public land law. Upon receipt of response by Lord the matter will be further considered.

#### FRED GORDON AND OVERLY LAND AND MORTGAGE COMPANY.

*Decided January 14, 1924.*

#### MORTGAGEE—ENLARGED HOMESTEAD—PATENT—OIL AND GAS LANDS—SURFACE RIGHTS.

Consent to accept a restricted patent in accordance with the provisions of the act of July 17, 1914, for oil and gas lands, may be filed by a mortgagee, if the homestead entryman, after proper notification fails to do so.

FINNEY, *First Assistant Secretary*:

The Commissioner of the General Land Office has submitted to the Department the entry made by Fred Gordon on November 21, 1916, under section 7 of the enlarged homestead act for N.  $\frac{1}{2}$  SE.  $\frac{1}{4}$ , Sec. 18, T. 26 N., R. 1 E., M. M., Great Falls, Montana, land district, as additional to his homestead entry embracing E.  $\frac{1}{2}$  NE.  $\frac{1}{4}$  and E.  $\frac{1}{2}$  SE.  $\frac{1}{4}$ , Sec. 32, said township.

It appears that entryman mortgaged the land to secure the payment of a loan of \$700, and in the spring of 1921 left for parts unknown. Under date of September 28, 1922, the Commissioner of the General Land Office required Gordon to begin publication of notice of intention to submit final proof, failing in which the Overly Land and Mortgage Company, mortgagee, would be permitted to submit final proof. The notice addressed to entryman was returned un-

*Done by me at Kansas City, Mo. at 12 o'clock*

28908552

claimed, and on January 22, 1923, the mortgagee company, by its treasurer, submitted final proof, showing that entryman had continued to reside on the original entry until the spring of 1921, that the land had been fenced, and that 20 acres had been cultivated during 1918 and 1919. The witnesses did not remember as to what had been done in 1920, but testified that no crops were planted in 1921 and 1922.

An application for a permit under section 13 of the act of February 25, 1920 (41 Stat., 437), to prospect for oil and gas upon the land having been filed, the Commissioner of the General Land Office, under date of March 9, 1923, allowed Gordon to file his consent to the reservation to the United States of the oil and gas content of the land and to exercise his preference right to a prospecting permit under section 20 of the oil leasing act, or to show cause why he should not consent to the mineral reservation. Entryman took no action, but the mortgagee company filed its consent to accept a patent containing the provisions and reservations of the act of July 17, 1914 (38 Stat., 509), as to oil and gas.

By decision of November 20, 1923, the Commissioner of the General Land Office held that the mortgagee's consent to accept a restricted patent could not be accepted, and held the entry for cancellation, also holding that the final proof was unsatisfactory because it failed to show that cultivation had been continued after 1919. No appeal has been filed, but a communication has been received from the holder of the note secured by the mortgage.

The statutory life of the entry expired November 20, 1921. Such cultivation as had been performed was unprofitable, the crops each year being failures. Under the circumstances disclosed, the requirements as to cultivation are reduced to what has been actually cultivated.

Entryman has been accorded an opportunity to consent to accept a restricted patent, or to show cause why he should not file such consent. He has taken no action, intending apparently to abandon the land. The mortgagee company, the real party in interest, has filed its consent, as heretofore stated, and the Department is of opinion that the consent should be accepted. Otherwise the relief to which the mortgagee is entitled would be wholly defeated.

Accordingly, the Commissioner's decision of November 20, 1923, is reversed, and final certificate will issue in the absence of objection not now appearing, the certificate to be indorsed:

Patent to contain the provisions, reservations, conditions, and limitations of the act of July 17, 1914 (38 Stat., 509).

## JOHN W. STANTON.

*Decided January 17, 1924.*

HOMESTEAD ENTRY—PATENT—PURCHASER—OIL AND GAS LANDS—WITHDRAWAL—EVIDENCE—BURDEN OF PROOF—PAYMENT—VESTED RIGHTS.

Where by statute payment of the purchase price is all that remains to be done by one in order to acquire title to a tract of nonmineral public land, payment thereof entitles the purchaser to an unrestricted patent, if, prior thereto, there had been no withdrawal, classification, or report that the land was prospectively valuable for mineral, unless the Government assumes the burden of proof and shows that the land was of known mineral character at that time.

## COURT DECISION CITED AND APPLIED.

Case of State of Wyoming *et al. v. United States* (255 U. S., 489), cited and applied.

FINNEY, *First Assistant Secretary*:

This is an appeal by John W. Stanton from the decision of the Commissioner of the General Land Office, dated September 12, 1923, which required him to consent to the amendment of his homestead entry for the NE.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , Sec. 3, W.  $\frac{1}{2}$  SW.  $\frac{1}{4}$ , Sec. 2, and N.  $\frac{1}{2}$  NW.  $\frac{1}{4}$ , Sec. 11, T. 23 N., R. 4 E., M. M., Great Falls, Montana, land district, so as to make it subject to the provisions and reservations of the act of July 17, 1914 (38 Stat., 509), as to oil and gas, and to exercise a preference right to a permit to prospect for oil and gas, pursuant to section 20 of the leasing act of February 25, 1920 (41 Stat., 437).

On May 26, 1915, John Stoica made homestead entry for the described land. The entryman died intestate, in November, 1918, without any heirs qualified to succeed to his rights under said entry. In 1919 Stanton filed notice of a mortgage lien upon the land involved, and, after it was held that he could not perfect the entry, having taken the mortgage before final proof was made by the entryman, Congress, by an act approved February 28, 1923 (42 Stat., 1781), provided—

That the Secretary of the Interior is hereby authorized, in his discretion, to issue patent to John W. Stanton, of Great Falls, Montana, for the west half of the southwest quarter of section two, the north half of the northwest quarter of section eleven, and the northeast quarter of the southeast quarter of section three, all in township twenty-three north of range four east, principal meridian of Montana, upon payment by said John W. Stanton therefor at the rate of \$1.25 per acre.

By letter dated March 20, 1923, the Commissioner directed the local officers as follows:

Under said act you will notify John W. Stanton, of Great Falls, Montana, that on the payment of \$1.25 per acre, final certificate and patent will issue to him for the land described in said act.

On March 27, 1923, the sum of \$250 was paid by Stanton, pursuant to the foregoing notice. Patent was withheld, however, in view of the fact that, on June 26, 1922, A. W. Hogan filed an application, pursuant to section 13 of the oil leasing act, for a permit to prospect for oil and gas upon the land involved; and the Director of the Geological Survey had made the following report, dated August 13, 1923, as to said lands:

This land is situated on the Sweetgrass Arch, a major uplift in northwestern Montana and southeastern Alberta, which in certain areas of favorable secondary structure superimposed on its flanks has yielded natural gas and showings of oil on both sides of the international boundary. In the Kevin Sunburst district in Ts. 33 to 35 N., R. 1 E., and Ts. 33 to 36 N., Rs. 1 to 3 W., petroleum and natural gas have been produced in commercial quantities since the early part of 1922. Owing to the presence of a surface mantle of glacial deposits over much of the area involved in this uplift the position of the secondary folds is largely a matter of determination by the drill. The Geological Survey is not informed whether any favorable secondary structure affects the land listed above and has no record to date of successful wells in the immediate vicinity.

The evidence available at this time indicates prospective mineral value but is not sufficient to establish that the land is known to be mineral in character.

In an earlier report, dated April 16, 1923, the Director stated that the geologic conditions existing under the land were such that an opportunity for prospecting should not be denied.

Appellant now claims that the discretion vested in the Secretary by the act of February 28, 1923, *supra*, was exhausted by the direction to the local officers that final certificate issue (to be followed by patent) upon the payment of a certain sum, which was thereafter paid, and submits that there remains only the ministerial duty to issue an unrestricted patent.

The Department does not construe the act of February 28, 1923, *supra*, to have such limitations, but, having in mind the obvious desire to place Stanton in a position to succeed to the rights of the deceased entryman, finds that the discretionary power conferred in said act was specifically conferred in order to permit supervision of the acts of Stanton in that respect.

As was stated in an opinion by the Department which formed the basis for the Commissioner's decision—

\* \* \* it seems manifest that the purpose of the enactment was only to protect such interest by subrogating him (Stanton) to the rights of the entryman and by placing him in as good a position under the circumstances, as he would have occupied had the entryman not died, and that being the purpose it should be held that he is entitled to only such rights as the entryman had, no more and no less.

Had there been a withdrawal, classification, or report that the lands were prospectively valuable for oil or gas, prior to the completion of final proof by the entryman, action similar to that taken

in this case would have been in accordance with the provisions of the act of July 17, 1914 (38 Stat., 509), authorizing surface patents for mineral lands. Where, however, there is no such report, withdrawal, or classification, prior to the performance by the entryman of all the acts prescribed by law as precedent to a right to an unrestricted patent, the burden is upon the Government to show that, at the date of completed final proof, or some equivalent final act of the entryman or claimant, the lands were known to be mineral in character. *State of Wyoming et al. v. United States* (255 U. S., 489).

In this case the payment of the purchase price prescribed by the Congress was the final act prescribed by law as necessary to be performed by Stanton; and, as the report as to the prospective mineral character of the land was not rendered until after such payment had been made and accepted by the local officers, Stanton acquired equitable title, and the burden of showing that the lands were known to be mineral in character at the time of payment shifted to the Government.

The report from the Geological Survey indicates that evidence sufficient to sustain a charge that the lands are known to contain minerals is not available in that bureau, nor is the Department aware of evidence from other sources sufficient to warrant it in withholding patent for the land involved, pending a hearing at which it would be required to assume the burden of proof.

For the reasons stated, the decision of the Commissioner is reversed, the case closed, and the record remanded for the issuance of an unrestricted patent, in the absence of objections not now apparent.

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### OREGON BASIN OIL AND GAS COMPANY.<sup>1</sup>

*Decided October 12, 1923.*

#### MINING CLAIM—OIL AND GAS LANDS—SECTIONS 2320 AND 2329, REVISED STATUTES.

The provision in section 2320, Revised Statutes, that with respect to lode mining claims no location shall be made until there shall have been a discovery of the vein or lode within the limits of the claim located, was made applicable to placer mining claims by section 2329, Revised Statutes.

#### OIL AND GAS LANDS—MINING CLAIM—PATENT.

A meager showing of oil in a well drilled on a location to a stratum of sand wholly separate and distinct from the underlying formations in which workable oil deposits are expected to be developed within the limits of the claim and in the vicinity thereof does not constitute a valid discovery, and affords no legal basis for entry and patent under the placer mining laws.

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<sup>1</sup> See decision on rehearing, page 253.

## COURT DECISIONS APPLIED—COURT DECISION DISREGARDED.

Cases of *Bay v. Oklahoma Southern Gas, Oil, and Mining Company* (73 Pac., 936), *United States v. McCutchen* (238 Fed., 575), and *Chrisman v. Miller* (197 U. S., 313), cited and applied; case of *United States v. Ohio Oil Company et al.* (240 Fed., 996), disregarded.

FINNEY, *First Assistant Secretary*:

This is an appeal by the Oregon Basin Oil and Gas Company from the decision of the Commissioner of the General Land Office of May 1, 1923, holding for rejection its application 013740, for patent to the Wilson No. 3 oil placer mining claim embracing lots 1, 2, and 3, Sec. 5, T. 50 N., R. 100 W., 6th P. M., Lander land district, Wyoming, on the ground that a valid discovery of mineral has not been shown to have been made within the limits of the claim.

The land, it appears, is included within Petroleum Reserve No. 32 created by Executive order of May 6, 1914. The application for patent was filed October 19, 1922, and is based upon a location alleged to have been made, after discovery, June 9, 1912.

The showing upon which the company bases its claim to a patent to the ground in question is to the effect that during May, 1912, there was drilled upon the land a well 43 feet deep in which at a depth of 38 feet there was discovered a considerable quantity of heavy, greasy oil showing the usual characteristics of petroleum products, and floating upon and mixed with sand pumpings consisting of a mixture of dirt, shale and water extracted from the hole; that in April, 1913, a second well was commenced upon the claim and on the 28th of the same month was completed to a total depth of 434 feet; that the log of said well shows that it was drilled through shale and several sandstone members; that, at a depth of 425 feet, oil was encountered in said well from which there was dipped a sufficient quantity of oil to fill a quart bottle; that the bottle was sealed and delivered to the general superintendent of the company performing the drilling on the claim; that said oil was green in color and was present in substantial quantities; that in the judgment of the said superintendent, the oil was of very good grade and such as would be salable if transported to market; that it was present on the land in sufficient quantity to justify the belief that marketable production thereof could be obtained if and when a market should become available; that, in the judgment of the said superintendent and others, the showing justified the further expenditure of time and money with the expectation of developing a paying deposit of oil upon the claim; that the one here in question, lies upon and near the southern end of what is termed the Oregon Basin anticline which extends longitudinally in a north and south direction through the west half of T. 51 N., R.

100 W., and the three sections adjoining it on the north and the south; that the said anticline consists of two domes, one denominated the major dome comprising the SW.  $\frac{1}{4}$ , said T. 51 N., and sections 4, 5 and 6 of the adjoining township on the south, and the other denominated the minor dome comprising the NW.  $\frac{1}{4}$ , said T. 51, and Secs. 31, 32 and 33 of the adjoining township on the north; that the applicant company owns a large number of placer mining claims situated on said dome, including the McMahon, embracing the SW.  $\frac{1}{4}$ , Sec. 32; the Hallene, embracing the SW.  $\frac{1}{4}$ , Sec. 29; the Jack, embracing the NW.  $\frac{1}{4}$ , Sec. 30; the Pauline, embracing the SE.  $\frac{1}{4}$ , Sec. 5, and the Sidney, embracing the NW.  $\frac{1}{4}$ , Sec. 5, all in T. 51 N., R. 100 W.; the Saffold, embracing the NW.  $\frac{1}{4}$ , Sec. 32, T. 52 N., R. 100 W., which six claims last mentioned had been patented; that on August 22, 1912, a well was completed to a depth of 1322 feet on the McMahon claim which adjoins the land here in question on the north in which gas was discovered in large volume and under great pressure; that in September, 1912, a well was commenced on the Pauline claim situated five miles to the north of the land, and completed to a depth of 2190 feet January 22, 1913, in which oil and gas in commercial quantities were found, the oil being encountered at a depth of 1765 feet; that in the fall of 1913, a well was commenced on the Hallene claim, situated a mile from the north of the land, and was completed to a depth of 1632 feet in the spring of 1914; that the result of the drilling of that well was disappointing in that it did not develop oil in paying quantities, but, on the contrary, developed a large flow of gas which, by reason of its heavy rock pressure was almost uncontrollable, entailing much time and expense in attempting to shut off the flow of the gas, through which it was impossible to drill; that in the spring of 1914, a well was commenced on the Jack claim situated a little more than a mile and a half to the northwest of the land in question and was completed October 1, 1914, to a depth of 1625 feet; that while oil was discovered in that well, it was not found there in large quantity; that the operations on the major dome, however, on which the land in question appears to be situated, developed a gas field of considerable area under high pressure, with the possibility of oil deposits being found under the gas if it could be penetrated or reduced in pressure by extraction; that in December, 1916, a well was completed to a depth of 1540 feet on the Sidney claim, situated  $5\frac{1}{2}$  miles to the north of the land in question, the result of the drilling of which was another development of gas in large quantity, so great that it was impossible to penetrate it to ascertain whether oil in commercial quantities existed below the gas area and again making it appear that the well

had been located too high on the structure of the minor dome; that during the summer of 1917, a well was commenced on the Saffold claim, situated  $6\frac{1}{2}$  miles to the north of the land, which well was completed to a depth of 1779 feet in June, 1918; that both oil and gas were developed in that well the former in commercial quantities, but that the capacity of the well has not been tested on account of the fact that there has been no commercial market for oil that might be produced there because of the lack of pipe lines and other marketing facilities; that the oil is of high grade, and that it seems probable that a satisfactory production can be secured and that with the reduction of the gas pressure from the Pauline and Sidney wells, both located on the minor dome, further oil production may be secured. It appears further that attempts had been made to dispose of the gas produced on the claims named but had failed for the reason that there is no demand for such product at any place within a reasonably transportable distance from the claim.

In connection with the showing there was submitted a sealed quart bottle marked "Wilson No. 3, Depth 425 feet, Apr. 27/13," nearly full of a dark colored liquid, the lower two-thirds of which appear to be of a considerably higher specific gravity than the upper one-third and which would suggest the possibility that the heavier portion of the liquid is water if the remainder consisted of oil.

The Commissioner, in the decision appealed from, held that the showing made by the applicant demonstrates only that in the wells drilled on the claim in question merely indications of oil were found; that the penetration of a formation saturated with oil, from which one quart of oil was secured, together with the theory that the oil is present on the land in quantity, does not fulfill the legal requirements as to discovery; that to constitute a valid discovery upon a petroleum placer mining claim—

oil or gas in commercial quantities must have been produced, or it must lead to the conclusion that, from the discovery made, it can be produced in commercial quantities on the claim in question.

The showing made was therefore declared to be insufficient to establish the existence of a valid discovery of mineral on the claim, and for that reason, as hereinbefore stated, the application was held for rejection.

The appeal challenges the correctness of the Commissioner's decision on the following stated grounds:

(1) In view of the admitted physical production of petroleum from the well drilled in 1913, at a depth of 425 feet, from which a sample was then taken, and preserved in a quart bottle, which was produced before the Commissioner, it was error to find that nothing more than "*indications*" of oil were found,

i. e., it was error to hold that *petroleum itself* is but an indication of petroleum.

(2) It was error to hold that the discovery of petroleum, of which a sample was taken and preserved, did not validate the location, regardless of whether or not the oil deposit so discovered was thereafter developed sufficiently to be commercially productive.

(3) It was error to hold, in effect, that a commercially producing well is a necessary incident to a discovery of petroleum upon a placer claim, i. e., it was error to fail to distinguish between "discovery" as that word is used in the mining law, and the actual commercial production of mineral, whether petroleum or other kinds of mineral, discovery being necessary to the validity of a mining claim, but commercial production not being an essential to such validity.

In the argument submitted both by brief and orally to support the appeal, it is conceded that so far as disclosed the oil deposit actually encountered upon the land possesses no economic importance and that the formations from which the applicant expects to develop commercial oil deposits on the land lie at depths many hundred feet below the formations penetrated by the deeper of the two wells already drilled on the claim and are at present incapable of practical development because of the presence, as disclosed in other places in the Oregon Basin field, of large volumes of gas, under exceedingly high pressure, overlying the deposits sought to be reached. It is urged, however, that regardless of these facts and in view of the further fact that the land has been, through its designation by the Geological Survey as being within the limits of the geologic structure of a producing field, in effect, classified as oil and gas in character, the disclosures already made upon and in the vicinity of the land should be accepted as constituting a legal discovery, and as entitling the applicant to a patent to the claim. To sustain that contention the appellant cites the decision rendered January 31, 1916, by the United States District Court, District of Wyoming, in *United States v. Ohio Oil Company et al.* (240 Fed., 996). That was a proceeding wherein the United States sought a decree adjudging and decreeing that the defendants had no right, title, interest or claim to the lands involved, which had been included in a petroleum withdrawal of May 6, 1914, and that all the minerals, including oil and gas, were the property of the United States. The lands, it appeared, had been included in two placer mining locations alleged to have been made about a year prior to the date of the withdrawal and, as stated by the court in said decision, the pleadings presented two questions for determination, namely, (1) was there a discovery of mineral upon the lands in controversy prior to the date of the withdrawal order; (2) were the defendants at the date of the withdrawal order in the diligent prosecution of work leading to the discovery of oil on the claims or either of them, and thereafter continued in the diligent prosecution of such work. The court declared

that the affirmative evidence upon the question of discovery was found in the testimony of those witnesses to the effect that on July 30, 1913, they commenced the drilling of a prospect well on one of the claims and continued it to a depth of 35 feet "and that oil was discovered therein"; that on August 2, 1913, they began the drilling of a well on the other claim and continued the same to a depth of 57 feet, "and that oil was discovered therein"; that two of said witnesses testified "not only to the effect that they found oil, but that the oil found by them was of sufficient quantity and quality to justify a person of ordinary prudence in making further expenditures of money and labor, with a reasonable prospect of success in developing a valuable deposit of oil, and in this view they are sustained by the subsequent development of property." The court declared that that testimony was met only by negative testimony on the part of the Government and that applying the ordinary rules of evidence governing the weight to be attached to affirmative and negative testimony, it felt bound to find that oil was taken from and was found in the test well or wells driven on the land in controversy as testified by the three witnesses for the defendant. The court after a review of a number of cases said (p. 1004):

Applying the principles announced in this and other cases (to some of which I have referred) to the evidence in this case, I think the lessors of the defendant the Ohio Oil Company made a sufficient discovery of oil on the claims in controversy to entitle them to make valid locations of the same as placer claims. There can be no question, I think, as to the good faith of these locators, for within a year after the date of discovery two commercial wells were brought in upon these claims at an expense of more than \$20,000.

The court, however, while questioning the necessity therefor, further found and held that at the date of the withdrawal of the lands the defendants were *bona fide* occupants and claimants thereof and were engaged in the diligent prosecution of work leading to the discovery of oil in commercial quantities on the land at the date of the withdrawal. It accordingly passed a decree in favor of the defendant.

The case was carried on appeal to the United States Circuit Court of Appeals, 8th Circuit, and was there decided October 13, 1916, under the title *United States v. Grass Creek Oil and Gas Company* (236 Fed., 481). The appellate court, however, after stating the issues in the case to be substantially as recited in the decision below and in the order named, and declaring that "in view of the conclusions reached, we deem it unnecessary to determine the first issue, as a finding in favor of the defendants on either issue must result in the affirmance of the decree," found and held the claims there in controversy to have been valid on the bases of discoveries made in July, 1914, of oil in commercial quantities in wells drilled to depths

approximating 1000 feet, as the result of the diligent prosecution of work looking to discovery commencing after April 19, 1914, but prior to May 6, 1914, the date of the order of withdrawal. The fact that the appellate court thus deliberately passed over the earlier asserted 1913 discoveries, the question as to the sufficiency of which to support the locations was before it as the first issue, and sustained the validity of the locations solely on the bases of the 1914 discoveries of oil in commercial quantities, would strongly suggest that the court was at least doubtful as to the correctness of the holding of the court below to the effect that the disclosures made upon the claim in 1913, constituted legally sufficient discoveries. Under the circumstances, therefore, the Department is not now disposed to regard the said decision in *United States v. Ohio Oil Company* as an authority on the question as to what constitutes a legal discovery of oil, and the same will not hereafter be followed by the Land Department.

In the same connection also the appellant cited the unreported departmental decision of October 3, 1918, in *United States v. Dudley Oil Company* but a far more substantial showing was made there than that relied upon in the present case. The Department, in its decision of October 3, 1919, found that—

The company introduced in evidence a copy of the log of the well and produced seven witnesses familiar with the land. The log showed that in the well, from a depth of 221 feet to 224 feet was encountered a reef, very hard.

From 224 ft. to 239 ft. Starting in oil sand showing high grade oil.

From 239 ft. to 259 ft. Oil and white sand.

From 259 ft. to 264 ft. Through mixed shale.

\* \* \* \* \*

From 420 ft. to 449 ft. Shale and sand showing oil.

By the company's evidence it is shown that the well was drilled to the depth of 449 feet before the application was filed, the drilling being done by lessees who were to get an interest (one-half) in the land when patent was issued. At about 230 feet in the well a light gravity oil was encountered. The tools showed oil and oil appeared in the sump. Drilling was continued with the expectation of striking more oil, possibly a gusher. There was a showing of oil at the bottom of the well when drilling ceased. Drilling was stopped because there was developed sufficient oil for patent purposes and on account of expenses, the cost of the well then being about \$2,500. Water arose in the well with oil on top to within about 130 feet of the surface. Numerous samples of oil were dipped out, the oil standing 10 to 12 feet in depth upon the water. One of the sample bottles of oil was produced at the hearing. The oil was of a grade worth \$1 per barrel at the well. One witness stated that he thought that they had a fifteen barrel well.

To the west of the well within 200 feet upon the SE.  $\frac{1}{4}$ , Sec. 27, was another well with a fine showing of oil at about 230 feet in depth and with 30 feet of oil sand. Patent was issued for that tract. Upon the SE.  $\frac{1}{4}$ , Sec. 35, a well was drilled with about the same showing and patent issued. On the NE.  $\frac{1}{4}$  of Sec. 34, a well about 1,200 feet deep showed the same surface oil and two deeper oil sands. That land was patented. From a well in Sec. 25, there was pumped at 150 feet, five barrels of oil per day and from a well on the

east line of Sec. 26 at 210 feet, eight barrels were pumped. That oil was sold for \$1.00 per barrel at the well. The quarter section to the north had oil and one witness stated that when he measured it last there was 125 feet of oil standing in that well.

The Department in that case held that taking into consideration the actual showing of oil made in the well drilled, in connection with all the surrounding conditions, it was convinced that a good and sufficient discovery of petroleum to support the location had been made.

It is true that in the later decision of March 13, 1919, rendered on motion for rehearing in the case, the Department cited the decision in *United States v. Ohio Oil Company et al., supra*, to sustain its previous decision of October 3, 1918, but a citation of that decision which, as above stated, the Department does not now see its way clear to follow, was not necessary to a determination of the question involved in the Dudley Oil Company case for it there appeared that an oil-bearing sand shown in a nearby well to be about 30 feet in thickness had been penetrated by the well on the land in question; that oil from such sand had been shown by actual demonstration to have been extracted in quantities expressed in terms of barrel lots; that oil taken apparently from the same deposits or geologic horizon had actually been sold at a well in the immediate vicinity of the land for a dollar a barrel; and that from others of such wells in the same vicinity from 5 to 8 barrels of oil per day had been produced, while the well on the land there in question was estimated to be one capable of producing 15 barrels per day.

As opposed to the said contention of appellant is the decision of the Supreme Court in *Chrisman v. Miller* (197 U. S., 313), which involved the sufficiency of an asserted discovery to support an oil mining location. The court there declared that even when the controversy is between two mineral claimants "there must be such a discovery of mineral as gives reasonable evidence of the fact either that there is a vein or lode carrying the precious mineral, or if it be claimed as placer ground that it is valuable for such mining." The language quoted from said decision was cited in *United States v. McCutchen et al.* (238 Fed., 575, 590), and was there construed as having reference to the deposit actually discovered on the claim. It was said:

Adopting the conclusion thus announced, there is nothing in the case at bar tending to show that the quantity of gas actually encountered had at the time of its discovery, or at any period up to the time of this trial any appreciable commercial value, or that its presence in the land, in the quantity in which it was found, served to impress upon the land any value at all. In the absence of such showing, in the face of this decision, I do not see how defendants' contentions can be accepted.

To the same effect also is the earlier decision in *Bay v. Oklahoma Southern Gas, Oil and Mining Company* (73 Pac., 936), wherein the court said (p. 940):

Valuable oil is found by drilling or boring into the interior of the earth, and either flows or is pumped to the surface; and until some body or vein has been discovered from which oil can be brought to the surface, it can not be considered of sufficient importance to warrant a location under the mining laws.

It was there held that a deposit encountered in a well drilled to a depth of 43 feet from which was taken  $1\frac{1}{2}$  gallons of oil at one dip with a well bucket did not serve to fulfill the requirements of a valid discovery.

Applying to the present case the principles announced and followed in the three decisions last cited the correctness of which principles has, so far as the Department is able to find, never been questioned by any court in any case involving an oil placer mining claim, except in the above cited case of *United States v. Ohio Oil Company*, the Department is clearly of opinion that the facts disclosed herein fall far short of establishing the existence of a legal discovery of mineral within the limits of the claim in question. The showing herein presented fails to satisfactorily establish that in either of the wells drilled on the claim there was encountered any formation carrying oil or other mineral in sufficient quantity to impress the land with any value on account thereof, while, on the other hand it is conclusively made to appear that the formations from which oil values are expected to be developed within the limits of the claim exist many hundred feet below, and are wholly unconnected with, the formations penetrated in said wells.

Nor can the facts that the land may be geologically known to contain at depths formations and sands which have been proved in other fields to be heavily productive of oil; that the land has been in effect classified by the Geological Survey as valuable on account of petroleum deposits; or that above the supposed oil bearing formations there exists within the limits of the claim gas deposits for which at the present time there is no available market, and which, on account of the excessive pressure thereof, can not be successfully drilled through in order to reach the supposed oil bearing formations sought, be accepted by the Department as the equivalent of a discovery as urged in the appeal, for, by section 2320, Revised Statutes, it is expressly declared, with respect to lode mining claims, that "no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located," and by section 2329, that claims usually called placers shall be subject to entry and patent only "under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims."

For the reasons herein stated the judgment of the Commissioner is affirmed.

## OREGON BASIN OIL AND GAS COMPANY (ON REHEARING).

*Decided February 1, 1924.*

### MINING CLAIM—OIL AND GAS LANDS.

To support a mining location, the discovery upon which the validity of the location is based must be of the particular deposit actually discovered within the limits of the claim for the reasonable prospect of the development of which into a valuable mine the evidence warrants further expenditure of time and money.

### MINING CLAIM—OIL AND GAS LANDS—EVIDENCE—PATENT.

The fact that developments outside of a mining location, or that geological deductions indicate the existence within the limits of the claim, but unexposed therein, of deposits wholly unconnected with the deposit actually exposed or discovered, sufficient to warrant expenditures in the development of the claim, does not constitute a valid discovery of mineral upon which to predicate a right to a patent.

### COURT AND DEPARTMENTAL DECISIONS APPLIED—DEPARTMENTAL DECISION DISTINGUISHED.

Cases of Shoshone Mining Company *v.* Rutter (87 Fed., 801), Nevada Sierra Oil Company *v.* Home Oil Company (98 Fed., 673), Granlick *et al.* *v.* Johnston *et al.* (213 Pac., 98), Chrisman *v.* Miller (197 U. S., 313), Donnelly *v.* United States (228 U. S., 243), and Jefferson-Montana Copper Mines Company (41 L. D., 320), cited and applied; case of Castle *v.* Womble (19 L. D., 455), distinguished.

### FINNEY, *First Assistant Secretary:*

This is a motion for rehearing filed by the Oregon Basin Oil and Gas Company in the matter of its application 013740 for patent to the Wilson No. 3 oil placer mining claim embracing lots 1, 2, and 3, Sec. 5, T. 50 N., R. 100 W., 6th P. M., Lander land district, Wyoming, wherein the Department by decision of October 12, 1923 (50 L. D., 244), affirmed the decision of the Commissioner of the General Land Office of May 1, 1923, holding said application for rejection on the ground that a valid discovery of mineral had not been made within the limits of said claim.

In connection with the motion a supplemental showing has been submitted on behalf of the applicant company and in support of the motion elaborate and able argument, both orally and by brief, has been presented to the Department together with argument in opposition thereto by an intervener.

It is urged in the motion that the Department erred in announcing in the decision complained of a rule wholly out of harmony with that laid down in the case of Castle *v.* Womble (19 L. D., 455), on

the faith of which it is asserted, the applicant acquired title to the claim here involved, and in giving a retroactive effect to what is alleged to be a new rule, which, it is claimed "would have the effect of denying applicant's title, which was good when acquired, under the law as previously announced by the Department and by the courts, and which prior rule constituted a well recognized rule of property."

The *Castle v. Womble* rule referred to is that—

\* \* \* where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine, the requirements of the statute have been met.

It is argued in the brief filed in support of the motion that under the said rule, good faith being present, but two essential factors are comprehended—(1) the finding of mineral, and (2) evidence that a person of ordinary prudence would be justified in further expenditure of labor and means with a prospect of success in developing a valuable mine, and that the evidence contemplated would include all surrounding, related and material facts not only of what had been found on the claim but on surrounding tracts either by actual operation or by geological examination. It is submitted that with respect to the claim here in question these requirements have been fulfilled; that it is shown (1) that the land in question is mineral in character; (2) that it was located in entire good faith under the placer mining laws of the United States and at a time when it was legally subject to such location; (3) that the location was followed by acts of development such as would naturally be expected of a locator of an oil or gas claim; (4) that continuous possession has been maintained of said claim from 1912 to the present time; (5) that a well was promptly commenced on the claim and was continued until the owners were satisfied of the existence within the limits of the claim of such deposits of oil or gas, or both, as would justify further expenditure of labor and means in the reasonable expectation of developing the claim into a source of commercial production; (6) that the claim constitutes a part of a group of oil placer mining claims held in common ownership; (7) that the showing secured in the well drilled on the claim in question, and on other claims of the consolidated group, was such as clearly induced the owners to expend a large amount of money, to wit, \$200,000, up to 1921, in the development of the group; and, (8) that adjoining the claim in question is a placer of the same group held in common ownership, which has been patented by the Government as a valid placer claim.

In the decision complained of the Department found that the showing submitted by the applicant failed to establish that in the well

drilled upon the claim there was encountered any formation carrying oil or other mineral in quantity sufficient to impress the land with any value on account thereof, while it appeared that the only formations from which workable oil or gas deposits were expected to be developed within the limits of the claim were those that lie many feet below and wholly unconnected with any formation penetrated by said well, such underlying formations, if included within the limits of the claim, being exposed only at places outside thereof. It was held that the meager showing of oil found in the said well at a depth of 425 feet, in a stratum of sand wholly separate and distinct from the underlying formations in which workable oil deposits are expected to be developed within the limits of the claim and in the vicinity thereof did not constitute a valid discovery and hence afforded no legal basis for entry and patent on the application. A careful consideration of the supplemental showing presented in connection with the motion affords nothing that tends to place the claim in any more favorable light than that originally relied upon by the applicant.

The Department is aware of no decision wherein, citing the rule announced in *Castle v. Womble*, it has ever taken into consideration the proven presence within the limits of a mining claim of deposits not actually and physically exposed therein as a ground for sustaining the sufficiency of an asserted discovery based upon the exposure within the limits of the claim of a deposit that did not warrant or justify the expenditure of time and money with a reasonable prospect of success in the development of a valuable mine on the particular deposit so exposed. On the contrary the Department in its decision of September 5, 1912, in *Jefferson-Montana Copper Mines Company* (41 L. D., 320), said:

After a careful consideration of the statute and the decisions thereunder, it is apparent that the following elements are necessary to constitute a valid discovery upon a lode mining claim:

1. There must be a vein or lode of quartz or other rock in place;
2. The quartz or other rock in place must carry gold or some other valuable mineral deposit;
3. The two preceding elements, when taken together, must be such as to warrant a prudent man in the expenditure of his time and money in the effort to develop a valuable mine.

It is clear that many factors may enter into the third element: The size of *the vein, as far as disclosed*, the quality and quantity of mineral *it carries, its proximity to working mines and location in an established mining district, the geological conditions, the fact that similar veins in the particular locality have been explored with success, and other like facts*, would all be considered by a prudent man in determining whether *the vein or lode he has discovered* warrants a further expenditure or not. [Italics supplied.]

In that decision the Department quoted, with significant emphasis, as indicated by italics, which were supplied by the Department, the

following from *Shoshone Mining Company v. Rutter et al.* (87 Fed., 801):

\* \* \* The seams, containing mineral-bearing earth and rock, which were discovered before the location was made, were similar in their character to the seams or veins of mineral matter that had induced other miners to locate claims in the same district, which by continued developments *thereon* had resulted in establishing the fact *that the seams, as depth was obtained thereon, were found to be a part of a well-defined lode or vein containing ore of great value.*

If any doubt ever existed as to the meaning of the *Castle v. Womble* rule, that doubt was removed by the decision in *Jefferson-Montana Copper Mines Company* which specifically points out that the particular deposit actually discovered within the limits of a mining claim is the one for the reasonable prospect of the development of which into a valuable mine the further expenditure of time and money must be shown to have been warranted by the evidence. The rule thus announced is clearly in accord with the decision of the Supreme Court in *Chrisman v. Miller* (197 U. S., 313), wherein the court held that to support a mining location—

\* \* \* there must be such a discovery of mineral as gives reasonable evidence of the fact that either there is a vein or lode carrying the precious mineral, or if it is claimed as placer ground, that it is valuable for such mining.

and found that—

\* \* \* There was not enough in what he (*Barieau*, the defendant's chief witness) claims to have *seen* to have justified a prudent person in the expenditure of money and labor in exploration for petroleum. [*Italics supplied.*]

And, again, in *Donnelly v. United States* (228 U. S., 243), the court after briefly setting forth the provisions of the placer mining laws, declared that one of the prime requisites for the acquirement of patent thereunder was "the discovery of a valuable mineral deposit within the limits of the claim," citing in support of that proposition the said case of *Chrisman v. Miller*. Under the decisions cited, therefore, it would seem to be wholly immaterial that there should be shown by developments outside the claim, or by geological deductions, the existence within the limits of the claim, but unexposed therein, of deposits wholly unconnected with the deposit actually exposed or discovered that would warrant such expenditures upon the claim.

The applicant, however, seeks to have a closed geologic structure shown to be productive of oil or gas regarded as analogous to a mineral bearing vein or lode, and to have applied to physical exposures of mineral, irrespective of actual value, within such a structure, the same rule regarding the sufficiency thereof as a legal discovery as that applied to mineral exposures on veins or lodes. In that connection attention is directed to the decision in *Nevada Sierra*

*Oil Co. v. Home Oil Co.* (98 Fed., 673), wherein the court, at page 676, said:

\* \* \* As was well said by Judge Hawley in *Book v. Mining Co.* (C. C.) 58 Fed. 106, 120, in speaking of vein and lode claims:

"When the locator finds rock in place containing mineral, he has made a discovery, within the meaning of the statute, whether the rock or earth is rich or poor, whether it assays high or low. It is the finding of the mineral in the rock in place, as distinguished from float rock, that constitutes the discovery, and warrants the prospector in making a location of a mining claim."

So, in respect to placer claims, if a competent locator actually finds upon unappropriated public land petroleum or other mineral in or upon the ground, and so situated as to constitute a part of it, it is a sufficient discovery, within the meaning of the statute, to justify a location under the law, without waiting to ascertain by exploration whether the ground contains the mineral in sufficient quantities to pay.

It is urged that by analogy, and with knowledge of the usual geological occurrences of oil and gas, the identical principle may, with reference to oil and gas bearing lands, be reasonably stated as follows:

When the placer locator has discovered a closed geological structure, containing the mineral (oil or gas), he has made a discovery within the meaning of the statute, "without waiting to ascertain by exploration whether the ground contains the mineral in sufficient quantities to pay."

And it is further urged that a recognition of that principle must lead to the adoption of a rule substantially as follows:

Where it appears that an oil or gas placer claim has been located in good faith, upon a structure geologically known to be oil or gas-bearing, or to be favorable to the existence of oil or gas therein, and where it further appears that either oil or gas has been actually found upon the claim, in such quantities, of such quality, and in such manner of occurrence as to justify a reasonably prudent man in further expenditure of means in developing or exploring the claim, with reasonable expectation of disclosing commercially valuable and productive deposits of these minerals, at greater depth, such discovery, coupled with such favorable surrounding conditions, is sufficient upon which to base a valid location under the placer mining laws, and is sufficient to entitle the owner to a patent, upon compliance with the additional requirements of those laws.

The Department, however, finds no substantial authority for the application of any such rule. On the contrary the same would seem to be out of harmony with the entire theory of the law respecting oil placer mining locations as repeatedly announced by the courts.

For the reasons stated the Department is clearly of opinion that the showing made with respect to the claim here in question is not affected by the *Castle v. Womble* rule.

The applicant company seeks to establish the similarity between the facts disclosed in the present case and those recited in the *Dudley Oil Company's* decision explained in the decision here complained of, with the substitution, however, of gas for the mineral oil in-

volved in the Dudley Oil Company case. No gas, however, is shown to have been encountered in the well sunk on the claim here in question and the Department is not persuaded that the showings of gas that are alleged to have occurred in wells sunk on other claims in that vicinity at a geologic horizon above the bottom of the well on the claim in question, are entitled to be regarded as establishing a discovery of a valuable gas deposit within the limits of that claim. The Dudley Oil Company decision, therefore, has no application to the present case.

The motion also alleges that the Department erred in refusing to follow the decision of the United States District Court for the district of Wyoming in *United States v. Ohio Oil Co.* (240 Fed., 996).

The Department is not only not persuaded by anything urged in the motion or in the accompanying brief that it did so err, but is convinced that its action in that respect finds support in the recent decision of the Supreme Court of Wyoming in *Granlick et al. v. Johnston et al.* (213 Pac., 98). See also *United States v. Donnelly, supra*.

Upon careful consideration of the motion as a whole, including points not herein specifically discussed, the Department sees no reason to disturb the decision complained of. The same is accordingly adhered to and the motion denied.

### OREGON BASIN OIL AND GAS COMPANY.

Petition for the exercise of supervisory authority denied by First Assistant Secretary Finney, February 21, 1924.

### CROW INDIAN LANDS—EXTENSION OF TIME FOR PAYMENTS.

#### INSTRUCTIONS.

[Circular No. 910.]

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., January 7, 1924.

REGISTER AND RECEIVER,

BILLINGS, MONTANA:

The President's proclamation issued December 18, 1923, providing for further extensions of time for payment by purchasers and entrymen under the President's proclamation of September 28, 1914 (38 Stat., 2029), and April 6, 1917 (40 Stat., 1653), of lands in the ceded portion of the Crow Indian Reservation, Montana, directs—

That any purchaser or entryman of lands within said former reservation who is unable to pay the purchase money due under his purchase or entry made

under the said proclamation of September 28, 1914, or the said proclamation of April 6, 1917, upon filing in the local land office an affidavit corroborated by two persons setting out his inability to make the required payment and the reasons therefor shall be granted an extension of time until the 1924 anniversary of the date of his entry or purchase upon the payment to the receiver of the district land office of interest at the rate of five per cent per annum on the amounts extended from the maturities thereof to the expiration of the periods of extension. The district land office will promptly notify all purchasers and entrymen entitled to the extension of the manner in which it may be obtained. If the affidavit is not filed and the interest paid within thirty days from receipt of notice or if within such time the amounts in arrears are not paid in full, the purchases or entries for which the amounts are due will be reported by the district land office to the General Land Office for cancellation.

Pursuant to the said proclamation the following regulations are prescribed:

1. The said proclamation of September 28, 1914, provided that one-third of the price of the land must be paid when the entry or purchase is made. In the case of a purchase the balance of the price must be paid in two equal payments, one year and two years thereafter, and in the case of an entry in two equal payments three years and four years thereafter unless paid sooner. The said proclamation of April 6, 1917, provides that one-fifth of the purchase price must be paid on the day following the sale and that the balance must be paid in four equal annual installments in 1, 2, 3, and 4 years after the date of sale unless paid sooner. The President's proclamation of May 5, 1920 (41 Stat., 1793), allowed an extension of time until the 1921 anniversaries of the dates of the purchases and entries made under the provisions of the two previous proclamations. By the President's proclamations of August 11, 1921 (42 Stat., 2246), and July 10, 1922 (42 Stat., 2281), further extensions of time were allowed until the 1923 anniversaries of the dates of such purchases and entries. Under the present proclamation an extension of time to the 1924 anniversaries of said purchases and entries may be secured under the conditions specified therein.

2. Within thirty days from receipt of notice to be given by you immediately any purchaser or entryman whose payments are in default at the time of such receipt must either pay the amounts due in full or he may file in your office a corroborated affidavit setting out his inability to do so and the reasons therefor accompanied by interest at the rate of five per cent per annum on the amounts for which an extension is sought.

3. The time for any payment can not be extended to a date beyond the 1924 anniversary.

4. Proof may be submitted at any time before such anniversary provided the requirements of the law as to payments are complied with.

5. No extension will be allowed unless the affidavit and interest as herein required are transmitted to your office within the time allowed.

You will forward copies of these instructions to all purchasers and entrymen who are affected thereby, advising each of them that in order to secure the benefits of this proclamation they must comply with its requirements as herein explained, and that in the event of failure to take such action within the time allowed, the purchase or entry will be reported for cancellation and forfeiture of payments without further notice to him. You will in due time report the entries in which no action has been taken transmitting evidence of service of notice.

WILLIAM SPRY,

Approved: *Commissioner.*

E. C. FINNEY,

*First Assistant Secretary.*

**REDUCTION OF AREA OF CULTIVATION—PARAGRAPH 27 (B),  
CIRCULAR NO. 541, AMENDED.**

**INSTRUCTIONS.**

[Circular No. 912.]

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., February 1, 1924.

REGISTERS AND RECEIVERS,

UNITED STATES LAND OFFICES:

At the end of paragraph 27 (b) of Circular No. 541 (48 L. D., 389, 398), the following is added:

Nor will a reduction in the area of cultivation, based on the physical conditions of the land, be permitted if, at the date of the application to enter, the land was designated and subject to entry under the stock-raising act. In such cases, the homesteader should file application for change of the character of the entry to one under the stock-raising act, showing therein the nonadaptability of the land for cultivation; that the land does not contain any water holes, or other body of water needed or used by the public for watering purposes; and his consent to the entry being made subject to the reservation to the United States of all coal and other minerals in the land, together with the right to prospect for, mine, and remove the same. The application of the entryman should be in affidavit form, and the showing therein as to the character of the land should be corroborated by the affidavits of two witnesses.

Give the widest publicity to the above addition that may be possible without expense to the United States.

WILLIAM SPRY,

Approved: *Commissioner.*

E. C. FINNEY,

*First Assistant Secretary.*

See 4916269  
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Dec

# **CONSOLIDATION OF NATIONAL FORESTS—DESCRIPTION OF LANDS TO BE EXCHANGED—CIRCULAR NO. 863, AMENDED.**

## **INSTRUCTIONS.**

[Circular No. 918.]

**DEPARTMENT OF THE INTERIOR,**

**GENERAL LAND OFFICE,**

*Washington D. C., February 1, 1924.*

**REGISTERS AND RECEIVERS,**

**UNITED STATES LAND OFFICES:**

That part of paragraph 2 of the regulations contained in joint Circular No. 863, approved October 28, 1922 (49 L. D., 365), for the administration of the act of March 20, 1922 (42 Stat., 465), which provides:

The land must be specifically described according to Government subdivisions, and nothing less than a legal subdivision may be surrendered or selected, is hereby amended to read as follows:

The land must be specifically described according to Government subdivisions, and, as a rule, nothing less than a legal subdivision may be surrendered or selected. An exception to this rule may be made only where in the opinion of the Secretary of Agriculture and the Secretary of the Interior such exception would be advantageous to the Government.

**WILLIAM SPRY,**  
*Commissioner.*

Approved:

**HUBERT WORK,**  
*Secretary of the Interior.*

**HENRY C. WALLACE,**  
*Secretary of Agriculture.*

# **PETROLEUM AND NAVAL RESERVES—STOCK-RAISING AND OTHER HOMESTEAD ENTRIES.**

## **INSTRUCTIONS.**

*See 57 L. D. 65*

[Circular No. 913.]

**DEPARTMENT OF THE INTERIOR,**

**GENERAL LAND OFFICE,**

*Washington, D. C., February 2, 1924.*

**REGISTERS AND RECEIVERS,**

**UNITED STATES LAND OFFICES:**

It appears that many local officers have allowed applications to make entry under the stock-raising homestead act for land within the limits of petroleum reserves. As said act is limited by its terms

to "unappropriated unreserved public land," you will reject, subject to the right of appeal, all applications to make entry under said act for land within the limits of petroleum reserves, even though the land may be designated as of the character contemplated by the said act.

As to stock-raising entries heretofore allowed for land within the limits of petroleum reserves, you will, on the submission of satisfactory final proof, forward all papers to this office, without the issuance of final certificate.

Applications to make entry under section 2289, Revised Statutes, or under the enlarged-homestead act for unappropriated land within petroleum reserves may be allowed if made subject to the provisions and reservations of the act of July 17, 1914 (38 Stat., 509), as to oil and gas, *provided the land is not also within the limits of the geologic structure of a producing oil or gas field.*

Lands within naval reserves are not subject to any form of appropriation.

WILLIAM SPRY,  
Commissioner.

Approved:

E. C. FINNEY,

First Assistant Secretary.

*reverted so far as in conflict*  
*53 L. D., 228*  
**INTERSTATE OIL CORPORATION AND FRANK O. CHITTENDEN.**

*Decided February 2, 1924.*

**MINING CLAIM—IMPROVEMENTS—FORFEITURE—OIL AND GAS LANDS—WITHDRAWAL—PUBLIC LAND.**

The provision in section 2324, Revised Statutes, declaring that a mining claim upon which the required annual assessment work has not been performed shall be subject to relocation in the same manner as if no location of the same had ever been made, impresses the land in a defaulted claim with the status of public land which, as long as it remains in that state, may be withdrawn by the Government.

**WITHDRAWAL—MINING CLAIM—OIL AND GAS LANDS—FORFEITURE.**

A withdrawal under the act of June 25, 1910, is, in its nature, a continuing withdrawal which, although not attaching to land that at date of withdrawal was within a valid existing claim, attaches immediately upon default of the claimant thereafter.

**OIL AND GAS LANDS—MINING CLAIM—LEASE—APPLICATION—PRACTICE.**

A pending application for patent under the placer mining laws of oil and gas lands should be denied and finally disposed of before the lands are offered for lease under competitive bidding.

**DEPARTMENTAL DECISIONS CITED AND APPLIED.**

Cases of Navajo Indian Reservation (30 L. D., 515), and E. C. Kinney (44 L. D., 580), cited and applied.

*no! see 295 us 639*

FINNEY, *First Assistant Secretary*:

The Interstate Oil Corporation, applicant for a mineral patent for the Turkey placer claim embracing lot 2, Sec. 18, T. 11 N., R. 23 W., S. B. M., Los Angeles, California, land district, has appealed from the decision of the Commissioner of the General Land Office, dated November 23, 1923, which rejected its mineral application for the described claim.

The appellant claims a right to a patent as the transferee, by mesne conveyances, of the Turkey placer mining claim, which was located on January 5, 1898, a discovery of petroleum on that date being alleged. It appears that some oil was produced and that annual assessment work was performed upon the claim from 1900 to 1906. In June, 1905, the claim was sold to the State of California for taxes due the preceding year. On August 4, 1920, the claim was sold by the State to one E. B. Miller, who, on December 8, 1920, transferred said claim to the Interstate Oil Company, which corporation, on January 24, 1922, assigned said claim to this appellant. A total expenditure of about \$30,000 by its predecessors is claimed by the appellant, who claims that four wells were drilled and production obtained between 1902 and 1904, and that all of said wells were pumped continuously thereafter for a period of "three or four years," but were then discontinued as unprofitable, owing to market conditions.

The tract involved was included in temporary petroleum withdrawal No. 5, made on September 27, 1909, and later in Petroleum Reserve No. 2, created by the order of the President on July 2, 1910. On August 11, 1920, a definition of the known geologic structure of the producing Sunset oil field was made by the Director of the Geological Survey, in accordance with the leasing act of February 25, 1920 (41 Stat., 437), which showed this claim to be within said field.

On November 8, 1921, Frank O. Chittenden applied to have this tract offered for lease, pursuant to section 17 of the leasing act of February 25, 1920, *supra*. Action was deferred upon this application until an investigation had disclosed that there were no adjacent lands available to be offered for lease with this tract, all said lands being patented. The desirability of early leasing was also made apparent by the production from wells on near-by land which threatened to diminish or exhaust the deposits underlying the land in question.

On April 7, 1923, the Department approved a recommendation by the Commissioner that said tract be offered for lease under the act of February 25, 1920; and due publication of notice thereof was had, said sale being set for June 7, 1923.

On June 5, 1923, the appellant company filed its application for patent, which was suspended for publication; but the Commissioner, upon being advised thereof by telegram from the local officers, di-

rected that the sale proceed. The sale was duly held as scheduled; and Chittenden was found to be the highest bidder, offering a bonus of \$1000, and making a cash payment of \$200.

Chittenden filed a protest against the mineral application on June 9, 1923, in which he charged that the claim was abandoned prior to its acquisition by the appellant.

In his decision of November 23, 1923, the Commissioner held that the mineral applicant must show that the annual assessment work required by law had been performed up to the date of the withdrawal of September 27, 1909, and had been continued up to the time when application for patent was filed.

This view is opposed in this appeal, the appellant claiming that any failure to perform the annual assessment work prescribed by the mining laws which may have occurred is a matter which may not properly concern the Government, being required only as a bar to relocation of the claim by adverse parties; and insists that, as it has shown an expenditure of more than \$600 for the benefit of the claim, it is entitled to a mineral patent. Citation of numerous authorities is made in support of this view.

Its claim that the requirement of section 2324, Revised Statutes, that annual assessment work be performed, is designed solely to preserve the rights of the locator against a hostile claimant, is too clearly in accord with well-settled construction of that statute to require discussion here.

The real question is whether the Government, by withdrawing the lands, is to be considered as having asserted a claim thereto of an adverse character, equally as potent as an adverse location in divesting the appellant of its claim if the assessment work had not been performed up to the time of said withdrawal; and whether, if such be the case, failure to perform the work required after the withdrawal caused such adverse claim of the Government to attach, and bars appellant's right to a patent under its application made thereafter.

The validity and effect of the withdrawal of September 27, 1909, was upheld by the Supreme Court of the United States in the case of *United States v. Midwest Oil Company* (236 U. S., 459). In that case the court pointed out that the power of the Executive to withdraw lands in aid of legislation or for other public purposes was a prerogative long exercised for the protection of the public interest, and so often acquiesced in by the Congress as to clearly reflect its will.

It has been held, however, on many occasions, that the right of withdrawal relates only to unappropriated public land; and that, if there was, at the time of withdrawal, a valid claim, said claim

is unaffected by the withdrawal so long as it is maintained in accordance with the law under which it was initiated.

This raises the question whether, at the time of the withdrawal in 1909, the tract in question was public land. Nothing of record indicates that the annual assessment work had been performed for several years preceding the withdrawal. If such be the case it is conceded that the lands were subject to relocation under the mining laws. Can it be said that they were not equally subject to withdrawal by the Government for a public purpose?

The provision of section 2324, Revised Statutes, on this point is as follows:

\* \* \* On each claim located after the tenth day of May, eighteen hundred and seventy-two, *and until a patent has been issued* therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year. \* \* \* and upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation *in the same manner as if no location of the same had ever been made*, \* \* \*. [Italics supplied.]

As interpreted by the appellant, this proviso allows only one form of entry during the period when the claim is unprotected by assessment work, namely by location.

The Department perceives a broader intention of the Congress expressed in the statute, by the words "in the same manner as if no location of the same had ever been made." If appellant's claim is correct these words are surplusage. That a statute is to be construed so as to give meaning to all of its parts, in harmony with each other and all other laws not superseded thereby, is a rule requiring no citation for support. The meaning of the quoted clause is apparent when it is considered that, as the lands were mineral and subject to disposal only pursuant to the mining laws, the only means whereby mineral lands could then be entered under the public land laws was by "location." The additional words indicated the real intent, to wit, that so long as the claim was not maintained according to law the situation was, so far as the status of the land was concerned, "as if no location of the same had ever been made."

Clearly, therefore, if this appellant or its predecessors had failed to perform the labor required prior to the withdrawal, and had not made application for patent, the land was, to all intents and purposes, public lands, and as such was subject to withdrawal by the Government. This view has heretofore been taken by the Department in the case of E. C. Kinney (44 L. D., 580), in a similar situation where lands were withdrawn for construction of irrigation works pursuant to the reclamation act of June 17, 1902 (32 Stat., 388).

There remains the question whether the withdrawal would have attached upon failure to continue assessment work after said withdrawal, although said work had been performed prior thereto. This can only be determined through consideration of the terms and scope of the withdrawal. Navajo Indian Reservation. (30 L. D., 515).

The order of withdrawal of September 27, 1909, provided:

In aid of proposed legislation affecting the use and disposition of the petroleum deposits on the public domain, all public lands in the accompanying lists are hereby temporarily withdrawn from all forms of location, settlement, selection, filing, entry, or disposal under the mineral or nonmineral public land laws. All locations or claims existing and valid on this date may proceed to entry in the usual manner after field investigation and examination.

In confirming this withdrawal in Executive order of July 2, 1910, creating Petroleum Reserve No. 2, said reservation was made subject to all of the provisions, limitations, exceptions and conditions of the act of June 25, 1910 (36 Stat., 847). That act provides, with respect to claimants of lands valuable for oil and gas, as follows:

That the rights of any person who, at the date of any order of withdrawal heretofore or hereafter made, is a bona fide occupant or claimant of oil or gas bearing lands, and who, at such date, is in diligent prosecution of work leading to discovery of oil or gas, shall not be affected or impaired by such order, so long as such occupant or claimant shall continue in diligent prosecution of said work: \* \* \*

While this provision relates to claims unperfected by discovery, which do not entitle the claimant or occupant to maintain his right to possession by performing assessment work, it nevertheless clearly reflects the intent of the Congress that such withdrawals should attach whenever a right, properly initiated and maintained at the time of withdrawal, was thereafter neglected or abandoned. The same intention is expressed in said act as to the rights of settlers, whose possessory claims are analogous in many respects to those of a mineral locator. This compels the conclusion that the withdrawal in question was intended to be of a continuing nature, and to attach immediately upon the default of any person having at the time of its inception a then subsisting and valid claim.

Such being the case, appellant's claim that performance of assessment work is a matter of no concern to the Government comes to this: By the withdrawal all subsequent locations are barred, yet the Government may not take advantage of any default or abandonment of a claim during the existence of said withdrawal, no matter how complete the abandonment or how pressing the need for the land for a public purpose. No reason exists, therefore, for the performance of the annual labor prescribed as necessary to maintain a right to possession; and the locator is, by the fact of the withdrawal, sheltered

from the consequences of his failure to perform the work prescribed by the statute, and said statute is repealed as to lands so withdrawn. The entire lack of justification, either legal or equitable, for the result above indicated clearly demonstrates the fallacy of the claim of this appellant. Certainly there is nothing in the expressed provisions of the act of June 25, 1910, *supra*, which indicates an intent to repeal or abrogate section 2324, Revised Statutes, in the manner claimed.

In the present case it is shown that some ten years elapsed with the mining title dormant in the State, the claim apparently abandoned; and that no effort was made to maintain the claim or to seek a patent until the Department had started to lease the land, pursuant to the act of February 25, 1920, *supra*, in the interest of the United States. Such leasing was in accordance with legislation in aid of which the land was withdrawn, and must relate back, as against this appellant, to the time when said withdrawal became effective.

The only error perceived by the Department in the action taken by the Commissioner is in directing that the sale proceed despite the pendency of appellant's application for patent. Said application was, in itself, a protest against the leasing of said land, and the auction should have been postponed until the appellant's application was disposed of.

Examination of the record and consideration of appellant's response to the protest by Chittenden indicate that the claim was purchased in 1920, from the State, for \$3,400, by Miller, and presumably was sold to this appellant for a comparable figure; and that the wells drilled are, in part at least, cased and capable of producing oil. Under those conditions the appellant will be allowed thirty days from notice within which to make application for a reoffering of the land for lease, and may submit a duly verified and corroborated statement of the present improvements on the land which will be of value to a lessee thereof, to the end that the Department may determine whether it should require a successful bidder for a lease of said land to pay to appellants such price for said improvements as it may determine to be just.

The Commissioner's decision is modified to conform to the views herein expressed, and the records returned to the General Land Office for the action herein directed.

# **CONSOLIDATION OF NATIONAL FORESTS—FEES FOR EXCHANGE OF LANDS AND TIMBER—CIRCULARS NOS. 863 AND 869, AMENDED.**

## **INSTRUCTIONS.**

[Circular No. 919.]

**DEPARTMENT OF THE INTERIOR,**

**GENERAL LAND OFFICE,**

*Washington, D. C., February 4, 1924.*

**REGISTERS AND RECEIVERS,**

**UNITED STATES LAND OFFICES:**

Section 6 of the regulations contained in joint Circular No. 863, approved October 28, 1922 (49 L. D., 365), for the administration of the act of March 20, 1922 (42 Stat., 465), and section 9 of the regulations contained in joint Circular No. 869, approved December 30, 1922 (49 L. D., 383), for the administration of the act of September 22, 1922 (42 Stat., 1017), are hereby amended to read as follows:

**Fees.**—Fees must be paid by the applicant at the rate of \$1 each to the register and receiver for each 160 acres, or fraction thereof, of the base lands surrendered and conveyed to the Government.

**WILLIAM SPRY,**

*Commissioner.*

Approved:

**HUBERT WORK,**

*Secretary of the Interior.*

**HENRY C. WALLACE,**

*Secretary of Agriculture.*

**AMOS N. S. KELLY.**

*Decided February 7, 1924.*

## **RECLAMATION HOMESTEAD—ASSIGNMENT—FINAL PROOF—FEES.**

The departmental rule that where a desert land entry upon which final certificate had not issued is acquired by an assignee through mesne transfers, that assignee, if qualified, is entitled to hold the entry, although the intervening assignees were not qualified to take an assignment, is applicable prior to payment of final commissions to reclamation homestead entries upon which final proof of compliance with the ordinary requirements of the homestead law has been submitted and accepted.

## **RECLAMATION HOMESTEAD—ASSIGNMENT—WATER RIGHT.**

The limitations imposed on assignments of reclamation homestead entries are limitations, not on the qualifications of the assignee, but on the right of the assignee to receive water.

## **RECLAMATION HOMESTEAD—OIL AND GAS LANDS—SURFACE RIGHTS—FEES—PATENT—WITHDRAWAL—EVIDENCE.**

Where land within a reclamation homestead entry is included within a petroleum reserve prior to payment of the final commissions, the entryman must consent to take a restricted patent as provided by the act of July

17, 1914, or apply for a reclassification of the land, and, in the latter alternative, the showing as to its mineral character must be as of the date of the payment of the final commissions.

DEPARTMENTAL DECISIONS CITED AND APPLIED.

Cases of Augusta Ernst (42 L. D., 90), Edward Pierson (47 L. D., 625), Cleveland Johnson (48 L. D., 18), and Jacob Terrell (49 L. D., 671), cited and applied.

FINNEY, *First Assistant Secretary*:

On March 28, 1903, George Deans made homestead entry 9607, under section 2289, Revised Statutes, for the S.  $\frac{1}{2}$  NE.  $\frac{1}{4}$  and N.  $\frac{1}{2}$  SE.  $\frac{1}{4}$ , Sec. 13, T. 30 N., R. 30 E., M. M., 160 acres, within the Glasgow land district, Montana.

The tract described was embraced in an area which had been withdrawn August 18, 1902, under the second form of withdrawal authorized by the reclamation act of June 17, 1902 (32 Stat., 388). The entry, therefore, was made subject to that act. Final proof of compliance with the ordinary provisions of the homestead law was submitted by Deans, October 1, 1908, and was filed January 19, 1909. Under the regulations then in force (38 L. D., 620, 633), the local officers were instructed in such cases to accept only the testimony fees for "reducing testimony to writing and examining and approving testimony" and not to accept final commissions payable under such entries until proof was submitted showing full compliance with all requirements of the act of June 17, 1902, *supra*, including the payment of all reclamation charges. This regulation with some change in the wording is still in force (45 L. D., 385, 399). The entryman paid the testimony fees for which receipt was issued. On October 27, 1910, the proof was accepted by the General Land Office.

The record of the entry appears to have been on or about October 27, 1910, placed in the files of the General Land Office, where it remained undisturbed, until August 11, 1923, when it was withdrawn from the said files for consideration by the Commissioner of the General Land Office in connection with a communication received from Amos N. S. Kelly. Meanwhile, the N.  $\frac{1}{2}$  SE.  $\frac{1}{4}$ , Sec. 13, was released from the reclamation withdrawal June 18, 1914, and the S.  $\frac{1}{2}$  NE.  $\frac{1}{4}$  of that section was likewise released March 28, 1916; and by Executive order of January 9, 1917, the entire tract was included in Petroleum Reserve No. 53. No final certificate has been issued on the entry.

The communication of Kelly included a letter dated July 12, 1923, in which he stated that he had recently purchased the above-described land from the administrator of the estate of Ole Veseth, who, the records showed, had on October 3, 1910, received a deed of the land from George Deans and his wife, Mary Deans. Kelly said that he

desired to secure a patent for the land and that he made application for such a patent.

In a decision rendered August 28, 1923, the Commissioner of the General Land Office found that the entry was of record in the name of the original entryman and that there was no evidence of transfer of title, other than that contained in Kelly's letter. It was concluded by the Commissioner that, however, as this transfer of title to Ole Veseth was said to have been made October 3, 1910, or before the restoration of the land from the reclamation withdrawal, it could be recognized as an assignment of the entry under the act of June 23, 1910 (36 Stat., 592), if the proper evidence of said assignment were furnished as required by Circular No. 716, a copy of which was inclosed to be forwarded to Kelly. Circular No. 716 comprises paragraph 41 of the General Reclamation Circular, approved May 18, 1916 (45 L. D., 385, 445), as amended July 1, 1920 (47 L. D., 417), and specifies what showing is to be made in connection with assignments of reclamation homestead entries.

The Commissioner held also in his decision as follows:

As the final commissions have not been paid and this land is now embraced in Petroleum Reserve No. 53, it will also be necessary for the purported assignee to file with the evidence of assignment (1) an election to take a limited patent containing the provisions and reservations of the act of July 17, 1914 (38 Stat., 509), as to oil and gas, or (2) to file in your office with the required evidence of an assignment an application for the reclassification of the land as non-mineral, together with a showing preferably the sworn statement of experts or practical miners of the facts upon which is founded the knowledge or belief that the land applied for is not known to be valuable for petroleum or gas at the date of the hearing.

The decision further allowed Kelly 30 days from notice within which to pay the final commissions and to secure the filing of the evidence of transfer of title referred to and with such evidence of transfer to file an election or an application for reclassification, as above described; and it was stated in the decision that, if the above steps were pursued, appropriate action would then be taken by the General Land Office looking to the acceptance of said assignment and the issuance of final certificate and patent to the recognized assignee, should no further objections appear, but in default of action as specified within the time allowed, the General Land Office would take action against the entry in the name of the original entryman.

On September 28, 1923, Kelly filed an appeal from so much of the Commissioner's decision as required the filing of an election to take a limited patent under the act of July 17, 1914, *supra*, or of an application for reclassification of the land; and therewith there were tendered on behalf of Kelly, and received, fees and commissions in

the sum of \$6 for which receipt was issued; and there was filed also evidence of transfer, consisting of (1) a certified copy of a warranty deed, executed on October 3, 1910, and filed for record on October 5, 1910, by which George Deans and his wife, Mary Deans, conveyed the land in question to Ole Veseth; (2) a certified copy of an order and decree of court, dated May 25, 1923, in the matter of the estate of Ole Veseth, deceased, whereby a sale of the land to Kelly by the executors of the estate of Veseth was confirmed, approved and declared valid and all proper and legal conveyances of the land were directed to be executed to the purchaser by the executors; (3) a certified copy of an executors' deed, executed May 25, 1923, and filed for record on the same day, by which Herman G. Robinson and Fred W. Hall, as executors of the estate of Ole Veseth, deceased, conveyed the land to Amos N. S. Kelly, it being recited that the sale of the land was made on May 4, 1923, at public auction, after due order of court. The court's proceedings appear to have been regular and no exception was taken to its action by the entryman's heirs or devisees. Accordingly, the sale to Kelly seems to be free from objection.

It is not quite clear to the Department whether the Commissioner held that the assignment attempted to be made to Veseth was the only possible assignment that could be considered with a view to its allowance. The regulations in effect at the date of the transfer by Deans to Veseth did not require an affidavit by the assignee (39 L. D., 202). It is unnecessary to inquire into the qualifications of Veseth to take as an assignee on October 3, 1910. The rule announced in *Augusta Ernst* (42 L. D., 90) relative to assignments of a desert-land entry for unsurveyed land on which final proof had been submitted and accepted, but final payment and issuance of final certificate had been deferred until survey of the land and adjustment thereto, has been held to be applicable to assignments of reclamation homestead entries on which final proof of compliance with the ordinary requirements of the homestead law has been submitted and accepted. See the unreported decision of July 29, 1920, in *Charles P. Mullen et al.* (D. 37710). That rule is that such entryman is permitted to assign his entry, and if such transferred or assigned entry be found by the Government in the hands of a person qualified to hold, the title should not be questioned simply because an intermediate transferee was not qualified to hold. In the case of *Jacob Terrell* (49 L. D., 671, 672), the reclamation homestead entry was made June 25, 1903, and final proof of compliance with the ordinary provisions of the homestead law was submitted August 22, 1908, which proof was accepted on January 18, 1909. The land involved was released from the reclamation withdrawal on October 18, 1919, and the final

commissions were paid on May 10, 1922. It was stated in the decision of the Department that prior to the date on which was made the payment of the final commissions the entryman could assign all or a portion of the land, under the provisions of the act of June 23, 1910 (36 Stat., 592).

If the land herein considered were still within the reclamation withdrawal, it would, of course, be necessary for Kelly to file the "affidavit of assignee" required in such cases. See *Edward Pierson* (47 L. D., 625). But since this land was long ago released from the reclamation withdrawal, it would be a vain thing to call upon Kelly to furnish such an affidavit. The limitations imposed on assignments of reclamation homestead entries are limitations not on the qualifications of the person to take as assignee but on the right of the assignee to receive water service—the area for and conditions on which water service shall be given one owner. See *Instructions of July 16, 1915* (44 L. D., 202, 204). The reason of the rule being changed, the rule is also changed.

Accordingly, under the evidence of transfer filed Kelly becomes substituted to and acquires all the right, title, interest and claim of the entryman, and has the right to do what the entryman could have done, if he had continued to hold the entry, namely, pay the final commissions and apply for and receive final certificate upon the filing of an election to take a limited patent containing the provisions and reservations of the act of July 17, 1914 (38 Stat., 509), or, as an alternative, pay the final commissions and file an application for reclassification of the land as nonmineral, in which event issuance of final certificate will be withheld until that matter is determined. Kelly has paid the final commissions. He should now comply with one or the other of the alternative requirements specified.

It is contended on behalf of Kelly that it was error for the Commissioner to require Kelly to file such an election or such an application for reclassification, but as to this phase of the case the ruling made in the case of *Jacob Terrell* (49 L. D., 671), is decisive. The following is quoted from the syllabus of the departmental decision in that case.

A homestead entryman does not acquire a complete equitable title in entered lands until he has done everything required by law toward earning title, including payment of lawful fees and commissions, and if, at any time prior thereto, the lands are included within a petroleum withdrawal he must, unless he proves that the lands are in fact nonmineral, consent to take a restricted patent as provided by the act of July 17, 1914, or suffer cancellation of his entry.

Counsel states that it is a matter of common knowledge that many entries embracing lands in the vicinity of the land here in question have been passed to patent and patents issued without any reservations of the oil and gas; and it is asserted that this con-

dition is true with reference to the entry of Frank D. Gage, being No. 03798, Glasgow series, which entry was made after the making of the entry of George Deans, but on which entry of Gage patent was issued without reservation. However, if in other cases unrestricted patents have been issued either inadvertently or otherwise, that fact will not justify the issuance of an unlimited patent in this case. See Cleveland Johnson (48 L. D., 18, 22).

It is observed that in the Commissioner's decision it was stated that as one of the alternative requirements there could be filed an application for the reclassification of the land, together with a showing of the facts upon which was founded the knowledge or belief that the land was not known to be valuable for petroleum or gas "at the date of the hearing." In order to conform with the holding in the decision in the case of Jacob Terrell, *supra*, it would be necessary for the showing to be that the land was not known to be valuable for petroleum or gas on the date on which the final commissions were paid.

The Commissioner's decision as above modified is affirmed, and the entry will be canceled, unless, within 30 days from notice, Kelly avails himself of one of the alternatives given him in the decision appealed from. The record is returned to the General Land Office for the action directed.

### LEONARD v. VOZZA, MARQUEZ, INTERVENER.

*Decided February 7, 1924.*

OCCUPANCY—IMPROVEMENTS—HOMESTEAD ENTRY—PURCHASER—CONTEST—PREFERENCE RIGHT—ESTOPPEL.

One who has purchased improvements placed upon a tract of public land by a homestead entryman, and is occupying and cultivating the land at the time of the initiation of a contest by a third party, should be accorded the privilege of intervening with the view to determining his right to defeat the preference right of the contestant on the ground of equitable estoppel.

FINNEY, *First Assistant Secretary*:

This is an appeal by Dionisio Marquez from the decision of the General Land Office of September 20, 1923, denying his petition to intervene in a contest brought by Virgil F. Leonard against the homestead entry of Giuseppe Vozza, which homestead, after the elimination of certain lots relinquished to the United States, embraced lot 2, Sec. 5, T. 4 S., R. 28 E., G. & S. R. M.

It appears from the record that the entry (made under section 2289, Revised Statutes) was allowed October 9, 1919, and that Vozza, the entryman, had theretofore lived upon the land involved since

1910. Leonard filed a contest on February 20, 1923, in which he charged after making the usual nonmilitary averments, that—

said entryman abandoned the land embraced in the entry on or about the first of February, 1921, and has not resided thereon since that date; that the tract has been wholly abandoned by entryman during more than six months last past; that the present residing place of the entryman, the contestant is informed, and believes, is at Stockton, California.

Notice was given by publication, and, no response having been made, a special hearing was had June 1, 1923; at which affidavits were submitted by contestant in support of the allegations touching the nonexistence of military or naval service. The local office transmitted the record with recommendation that the entry be canceled.

July 12, 1923, a petition to intervene and for a hearing was filed on behalf of Marquez, and as ground therefor it was alleged that he, with his family, had lived on the land in question since February 10, 1923, having purchased the improvements and interest of one Segundo Sierra, to whom Vozza, the entryman, had previously sold his improvements and interest; that Marquez paid Sierra \$500, in the belief that he was *purchasing* the land from him; that there were upon the tract a two-room frame house, corrals, a five-wire fence around the tillable land, which comprises 2 acres more or less, a pasture of 10 acres, also fenced, and 60 fruit trees, some of them 10 years old, which improvements had been placed upon the land by Vozza; that, had he known the status of the land, he would have taken steps to secure the relinquishment of Vozza and made entry of the land on his own behalf; that it was not until March, 1923, that he learned that the tract was public land; that on April 30, 1923, he filed a homestead application; that this was rejected because of the existing entry of Vozza; that he first learned of Leonard's contest of Vozza's entry in March, 1923, and at once sought legal advice as to how he should proceed. It is further alleged in the petition—

- That the said contestant, Virgil F. Leonard, knew that when he filed his said contest I was the owner of said improvements, claiming the land and the said improvements under my purchase and believing my title to be good; that when he filed the said contest and for several days prior thereto he knew I was residing upon said land with my family, claiming the same under color of title; and that the said contest was not filed in good faith but for the sole and only purpose of defrauding me of my land and improvements.

In the decision appealed from the Commissioner held:

The facts presented are not deemed sufficient to warrant allowance of the intervention petition.

When the petitioner settled upon the land and bought the improvements from Sierra, as stated in his petition, the land was already appropriated by the Vozza entry of record. The Department has repeatedly held that an entry segregates the land covered thereby, and so long as such entry exists it precludes any other disposition of the land.

Leonard, by bringing a contest and prosecuting it to a successful issue, became entitled to a cancellation of the Vozza entry and to preference rights incident thereto.

A reopening of the contest proceedings would serve no useful purpose, because even if Marquez were able to prove that he purchased improvements and settled upon the land February 10, 1923, ten days prior to the time the contest was filed, such proof would not defeat Leonard's preference right.

"The Land Department has jurisdiction to determine the equitable as well as the legal rights of parties claiming interests in public lands, and it is the duty of that department to recognize equities such as are recognized by the courts." *Aztec Land and Cattle Co. v. Tomlinson* (35 L. D., 161). In line with this, the Department stated, in its unreported decision rendered April 29, 1922, in the case of *Wall v. Rodriguez and Olguin*—

It is true that there might be cases in which the surrounding circumstances would defeat the preferred right of a contestant on the ground that he is equitably estopped or otherwise prevented from asserting such a right \* \* \*

In the exercise of its equitable powers, the Land Department has upon occasion withheld its approval of action, in public-land matters, based upon a valid legal claim duly prosecuted, but where, nevertheless, palpable injustice would result were such action taken. *Williams v. United States* (138 U. S., 514, 524). In the case of *Leon v. Grijalva* (3 L. D., 362) it was held that land is not subject to entry "that is improved and in actual occupancy in good faith by others."

In the instant case the land involved is claimed, occupied, and being cultivated under color of title by the applicant to intervene, who appears to have been of the belief that he had acquired title to the same by purchase. He charges that for several days prior to bringing contest the contestant knew that he (Marquez) was residing on the land with his family, claiming the same under color of title, and that the contest was brought for the sole purpose of defrauding him of this land and the improvements thereon.

In the opinion of the Department, the showing made by the petitioner entitles him to a hearing for the purpose of determining, from testimony, whether or not fraud was committed in connection with the contest brought, or whether the attendant facts and circumstances are such that the principle of equitable estoppel may with propriety be invoked. The decision is accordingly reversed, and the case remanded with direction that appropriate steps be taken looking to a hearing, after which such further action will be taken as may be called for by the then state of the record.

**FORT ASSINNIBOINE ABANDONED MILITARY RESERVATION—  
EXTENSION OF TIME FOR PAYMENTS—CIRCULAR NO. 899,  
AMENDED.**

**INSTRUCTIONS.**

[Circular No. 914.]

**DEPARTMENT OF THE INTERIOR,**

**GENERAL LAND OFFICE,**

*Washington, D. C., February 8, 1924.*

**REGISTER AND RECEIVER,**

**HAVRE, MONTANA:**

On December 13, 1923, the Department approved regulations amending Circular No. 899 (49 L. D., 599), which provided for an extension of time for payments on installments on Fort Assiniboine entries.

The amendatory provisions are as follows:

It has developed that the suspension of action on entries made of Fort Assiniboine Abandoned Military Reservation lands under the act of February 11, 1915 (38 Stat., 807), provided for in circular of May 3, 1923 (49 L. D., 599), does not in all cases afford the relief which it is believed was the intention of the circular to grant, taking into consideration the professed object of the circular, namely, to allow time within which Congress could come to the relief of delinquent entrymen.

It is therefore recommended that this office be authorized to grant an extension of time within which to make payments of the amounts in arrears on such entries, for such period as may be requested, not later than December 31, 1924, where the interest required to be paid by the extension act of January 6, 1921 (41 Stat., 1086), has been paid or shall be paid, and where an affidavit, corroborated by two parties, setting forth the causes by reason of which the entryman is unable to make his payments, has been or shall be filed in the local land office.

You will observe that in the regulations as amended the time for making payments can be extended on proper showing for such period as is requested, but not beyond December 31, 1924.

You will now proceed as directed in Circular No. 899, as amended.

Approved:

**E. C. FINNEY,**

*First Assistant Secretary.*

**WILLIAM SPRY,**

*Commissioner.*

**FOSTER v. HESS (ON REHEARING).**

*Decided February 8, 1924.*

**OIL AND GAS LANDS—PROSPECTING PERMIT—DESERT LAND—SURFACE RIGHTS—  
RESERVATION—WORDS AND PHRASES.**

The act of July 17, 1914, contemplates a reservation of mineral deposits in lands embraced in unperfected nonmineral entries wherever it appears from geologic data that prospecting operations are warranted, and lands having

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such prospective value are "valuable for" minerals within the meaning of the act, although no actual demonstrated existence of mineral deposits has been discovered.

**OIL AND GAS LANDS—HOMESTEAD ENTRY—SURFACE RIGHTS—RESERVATION—EVIDENCE—BURDEN OF PROOF.**

A departmental regulation declaring that a report by the Geological Survey that land covered by an unperfected nonmineral entry without a reservation of the oil and gas content has a prospective value for oil and gas, impresses the land with a *prima facie* mineral character, sufficient to require the entryman to consent to a reservation of the minerals or to assume the burden of proof and show that the land is in fact nonmineral, carries out the intent of Congress as expressed in the act of July 17, 1914, and is valid.

**OIL AND GAS LANDS—HOMESTEAD ENTRY—FINAL PROOF—EVIDENCE—BURDEN OF PROOF.**

Where a report by the Geological Survey, which shows that land within an unperfected nonmineral entry is prospectively valuable for its oil and gas contents, is lacking in the definiteness contemplated by the regulations issued pursuant to the leasing act, and is followed by a more specific report based upon the same facts, the first report is sufficient to put the nonmineral character of the land in issue, and submission of final proof prior to the supplemental report will not shift the burden of proof upon the Government.

**DEPARTMENTAL DECISIONS CITED AND APPLIED.**

Cases of *Marathon Oil Company v. West*, United States, intervener (48 L. D., 150), and *State of Utah v. Lichliter et al.* (50 L. D., 231), cited and applied.

**FINNEY, First Assistant Secretary:**

This is a motion for a rehearing filed by Treava G. Hess, in the matter of the requirement by the Department, in its decision of November 24, 1923, A. 5850, *Edward D. Foster v. George E. Plummer and Treava G. Hess* (unreported), that she consent to a reservation of the oil and gas deposits in the land covered by her homestead entry, as provided by the act of July 17, 1914 (38 Stat., 509), or establish that such land is in fact nonmineral.

Treava G. Hess made desert-land application for the SW. 1/4, Sec. 30, T. 10 N., R. 68 W., 6th P. M., Denver, Colorado, land district, on March 25, 1922. On June 29, 1922, Edward D. Foster filed application, pursuant to section 13 of the leasing act of February 25, 1920 (41 Stat., 437), for a permit to prospect for oil and gas upon these lands. Desert-land entry was allowed to applicant Hess on November 13, 1922. The lands were not at that time withdrawn, classified, or reported as valuable for oil or gas, and said entry was allowed without a mineral reservation.

On December 4, 1922, the Commissioner of the General Land Office called upon the Geological Survey for a report, pursuant to section 12(c) of departmental regulations, approved March 11, 1920 (47 L. D., 437), as to the prospective oil and gas value of said land. The

Director of that bureau, on May 14, 1923, furnished a report wherein he stated:

In my opinion the geologic conditions existing under this land are such that an opportunity for prospecting should not be denied.

By decision, dated June 27, 1923, and received by Hess on July 14, 1923, the Commissioner required the entrywoman to consent to a reservation of the oil and gas to the United States, or apply for a reclassification of the land as nonmineral, upon penalty of the cancellation of her entry.

Hess appealed on July 25, 1923, claiming that she had earned equitable title to the land in question by complete compliance with the homestead law as to residence and cultivation. Notice of intention to submit final proof was then being published. She also claimed that the report of the Director of the Geological Survey was not in accordance with the regulations under which it was requested. Final proof was not completed by the entrywoman until September 20, 1923.

In its decision of November 24, 1923, the Department cited a supplemental report rendered by the Director of the Geological Survey on November 15, 1923, which confirmed its earlier report and pointed out that the land is on the flank of the Wellington anticline, a geologic structure which was known to be prospectively valuable for deposits of oil and gas prior to the initiation of the homestead entry. The Department said, in denying the entrywoman's claims:

Nothing set forth in the affidavits filed by said entrymen tend to overcome the data furnished by the Director of the Geological Survey. The Director's report of May 14, 1923, put in issue the question as to the mineral character of the land, and as it was submitted prior to the submission of the final proofs, the burden of proof must be assumed by the entrymen if a hearing is ordered.

In her motion for rehearing, the entrywoman claims (1) that there was no sufficient compliance with section 12(c) of the leasing regulations prior to completed final proof on her entry, to impose upon her the burden of proving that the lands are in fact nonmineral (2) that the regulation in question is invalid, as it requires a report as to *prospective* oil and gas value of entered lands instead of demonstrated value of such lands for said minerals.

The entrywoman's second contention will first receive consideration, as a decision in her favor on that point will render consideration of her first claim unnecessary.

Her claim on that point is that an entryman of lands, not withdrawn, classified, or reported as valuable for oil and gas deposits at the time of entry, can only be required to consent to a reservation of such deposits when it is shown, prior to final entry, that the lands contain valuable deposits of oil or gas. In other words, the actual demonstrated existence of minerals is essential; and a reasonable belief that such deposits will be found, based upon geologic indications

which would warrant expenditures in prospecting operations, is not sufficient.

Analysis of the acts of July 17, 1914, and February 25, 1920, *supra*, discloses the fallacy of this claim.

The act of July 17, 1914, *supra*, provided a means whereby surface entries could be made and perfected upon lands "valuable for" deposits of nitrate, potash, oil, gas or asphaltic minerals; and authorized the issuance of patents to these surface entrymen, which patents should contain a reservation of the particular deposits for which the land was valuable, and reserved to the United States, its lessees or licensees, certain rights in respect to said deposits. It can not be doubted that this act was intended to permit the joint use of mineral lands; and that such rights were reserved from surface patents as would permit the Government, or those in privity with it, to fully exploit and develop the reserved deposits which gave the land value as mineral land.

Consideration of the rights reserved, therefore, must indicate what the Congress wished to withhold from the surface entrymen and to conserve. In each of the three sections of the act of July 17, 1914, the rights reserved are "*to prospect for, mine and remove*" the reserved deposits. [Italics supplied.] Lands which, from geologic indications, warrant *prospecting* operations to establish the actual existence of deposits of the minerals specified in the act of July 17, 1914, *supra*, are clearly, therefore, to be considered as "valuable for" such deposits within the meaning of said act; and a report as to such prospective value is a proper basis for a requirement that an entryman of lands having such prospective value consent to a reservation of the particular deposits, in accordance with said act. *State of Utah v. Lichliter et al.* (50 L. D., 231).

The point is attempted to be made that the requirement of a mineral reservation upon prospective mineral value of public land, or anything less than the actual demonstrated existence of minerals in the land entered pursuant to the nonmineral land laws, may result in an entryman receiving a surface patent for lands which do not contain minerals.

This claim is without weight; first because the agricultural or other nonmineral land laws contemplate the passing of title to nonmineral lands for such use for productivity as their surface will permit. An entryman under said laws should not, in good conscience, and in accordance with his expressed declarations at the time of entry, entertain any desire to secure more than such an interest.

A second reason for the lack of merit in the foregoing claim appears when the result of said claim, if allowed, is considered. Under that view, only such lands as had been prospected before final

entry could be properly classified as mineral. In all other cases, the entryman, by completing final proof, could force the hand of the Government and acquire unrestricted title to lands which, from their situation and from their geologic formation strongly suggested the presence of minerals, but which, for some reason not related to the character of the land (such as economic conditions retarding prospecting generally, or especial conditions of isolation, or similar difficulties), had not been prospected and the minerals discovered. The privilege given entrymen in section 2 of the act of July 17, 1914, of proving, before final entry, that the lands "are in fact nonmineral in character" clearly indicates a contrary intent of the Congress.

Any doubt which may have existed on this point prior to the passage of the leasing act of February 25, 1920, *supra*, which act is a complement of the act of July 17, 1914, *supra* (Marathon Oil Co. v. West, United States, intervener, 48 L. D., 150), was dispelled by the provisions of said leasing act. Under section 13 of that act, permits to prospect for oil and gas are authorized as to deposits of said minerals owned by the United States; and, in section 20 of said act, surface entrymen of lands entered before the lands were withdrawn or classified as mineral, who were thereafter required to consent to accept a restricted or surface patent with the minerals reserved to the United States, are given a preference right to a permit to prospect for oil or gas. When the actual existence of deposits of these minerals is established the entryman is entitled to a lease. No clearer evidence that lands prospectively valuable for oil and gas were intended to be patented under the nonmineral laws only with a reservation of such deposits can well be desired.

There remains the question whether the entrywoman had earned equitable title before the question as to the mineral character of the land was raised, so as to remove said entry from the jurisdiction of the Department, except in so far as it may be able to show that on the date of completed final proof the lands were known to be mineral in character.

The report by the Director of the Geological Survey, dated May 14, 1923, lacked the definiteness contemplated by the regulations of March 11, 1920, *supra*, and the entrywoman was justified in requiring a more specific report. The first report, however, put the question in issue; and, as the subsequent report of November 15, 1923, was by its terms merely an amplification of its earlier report, as to prospective value of the land, said report must be considered as relating back to, and completing the former incomplete report, in so far as it relates to facts known at that time. The fact that the entrywoman completed final proof in the interval between these two reports is immaterial, as she could not by so doing shift the burden of proof to the

Government, and change an issue already raised, thereby acquiring an unjust advantage through the failure of one of the bureaus of the Department to render as complete a first report as the regulations contemplated. The situation would, of course, be otherwise, if a second report was rendered upon data not known at the time of the earlier report.

In this case it appears that the first report could have contained all the information in the second report except as to a reported later discovery of gas, which discovery had no bearing on the question presented in this case, and was not relied upon in the previous decision of the Department.

The Department perceives no reason for a modification of its previous decision in this case, as to the entrywoman Hess, and this motion for a rehearing is denied. The records are returned to the General Land Office with instructions that she be allowed 15 days from notice within which to file a mineral waiver, or to exercise the privilege conferred by the act of July 17, 1914, *supra*, of showing that the land is in fact nonmineral.

WILLIAM ERICKSON.

*Decided February 20, 1924.*

*Dec 37 10566*

PATENT—LAKE—MONTANA—RIPARIAN RIGHTS.

An unrestricted patent issued by the Government conveying public lands abutting upon a nonnavigable lake in the State of Montana, in which the common law with respect to riparian proprietorship has been adopted, carries with it an absolute title to the lake bed.

LAKE—RIPARIAN RIGHTS—JURISDICTION.

Prior to the issuance of an unrestricted patent by the Government to its lands abutting upon a nonnavigable lake, the law of the State in which the lands are situated has no effect upon the title to the lands in the lake bed, and the United States may dispose of the bed of the lake separate from the uplands without regard for local law.

LAKE—RIPARIAN RIGHTS—JURISDICTION—SALINE LAND—PROSPECTING PERMIT—LEASE—PATENT.

Where the title to lands abutting upon a nonnavigable lake remains in the United States, the Government, as a riparian proprietor, may grant permits and leases pursuant to the act of February 25, 1920, of the lake bed separate and apart from the uplands, but patents for the uplands must contain appropriate reservations.

DEPARTMENTAL DECISION OVERRULED SO FAR AS IN CONFLICT.

Case of Clayton Phebus (48 L. D., 128), overruled so far as in conflict.

FINNEY, *First Assistant Secretary*:

This is an appeal by William Erickson from the decision of the Commissioner of the General Land Office, dated September 18, 1923, which rejected his application for a permit to prospect for sodium,

filed pursuant to the leasing act of February 25, 1920 (41 Stat., 437), for the reason that the area described was shown to consist of parts of the beds of three small, nonnavigable meandered lakes lying in sections 24, 25, and 26, T. 36 N., R. 58 E., M. P. M., Glasgow, Montana, land district, which were entirely surrounded by lands which have been disposed of by the United States, said disposals carrying with them title to the beds of the lakes.

This appellant claims that title to these lake beds is in the United States and that permits may properly be issued therefor pursuant to the leasing act of February 25, 1920, *supra*.

No error is perceived in the finding of fact by the Commissioner that the lakes are nonnavigable. They are shown upon the plats of survey to be narrow bodies of water without inlet or outlet, occupying basins of from one to about three miles in length in a country described in the field notes of the Government survey as mountainous and rolling. These notes show that the waters in said lakes are alkaline. The Department does observe, however, that lot 12 in section 24 and lot 6 in section 26, appear to be vacant public land. Title to the remaining upland passed from the United States before the passage of the leasing act, and without any reservations of sodium deposits to the Government.

It is too well settled to admit of question at this time that patents of public lands abutting upon nonnavigable lakes will be construed in accordance with the laws of the State within which the land is located; that unless a contrary intent is expressed in the patent, the meander line will be regarded as merely indicative of the amount of upland to be paid for by the patentee; and further, that where the common law of England is followed such patentees acquire title, ratably to the lands underlying the nonnavigable bodies of water. *Hardin v. Jordan* (140 U. S., 371), *Mitchell v. Smale* (140 U. S., 406), *Kean v. Calumet Canal and Improvement Company*, (190 U. S., 452), *Hardin v. Shedd* (190 U. S., 508), *Wilson and Company v. United States* (245 U. S., 24), *John P. Hoel* (13 L. D., 588); Instructions of January 12, 1892 (14 L. D., 119), *Grant L. Shumway* (47 L. D., 71), *Clayton Phebus* (48 L. D., 128).

The State of Montana has adopted the common law of England as controlling wherever not inconsistent with the constitutions of said State and the United States, and their statutes (section 3552 of the Code of Montana), and no such inconsistencies appear as to the rights of riparian owners. *Fordham v. Northern Pacific Railway Company* (30 Mont., 431; 76 Pac., 1040).

As there was no limitation in the patents issued for the uplands abutting upon the lakes involved herein it is clear that title has passed to the patentees for all those portions of the beds of said lakes, save that which remains in the United States and would pass as appur-

tenant to the vacant and unappropriated lots before described, upon the issuance of unqualified patents for said lots.

A prospecting permit issued pursuant to the leasing act of February 25, 1920, *supra*, would carry with it a riparian right to prospect the appurtenant portion of the lake bed. Clayton Phebus (48 L. D., 128). In the case cited the Department held:

The lake being thus completely surrounded by tracts covered by patents and a prospecting permit or applications therefor which attach to the entire bed of the lake, the Department would clearly in no event be warranted in granting a permit for any portion of the lake bed as such.

This ruling would seem to require the rejection of this application in its entirety on the ground that the interests in the lake beds are not severable from the upland, even as to the lots owned by the United States.

This case, however, presents the question anew with the added circumstance that the only areas, so far as is shown, which are likely to contain the mineral deposits desired to be discovered and leased by this appellant are those which are below the meander lines of the lakes.

The foregoing rule seems, upon consideration of the authorities herein cited, to be based upon the mistaken view that the law of the State within which nonnavigable lakes are situated, as to the rights of riparian owners, is binding upon the United States *before* it has parted with ownership of the uplands. That such is not the case clearly appears in the ruling of the Supreme Court in the case of *Hardin v. Jordan*, *supra*, that—

\* \* \* the *grants* of the Government for lands bounded on streams and other waters, *without any reservation and restriction of terms, are to be construed as to their effect according to the law of the State in which the lands lie.* [Italics supplied.]

In a later case in which the same court adhered to the ruling in *Mitchell v. Smale* and *Hardin v. Jordan*, *supra*, the court pointed out, with respect to the effect of said rulings upon grants by the Government "The United States can meet them by the *form* of its conveyances." *Kean v. Calumet Canal and Improvement Company* (190 U. S., 452).

Until the United States has passed titles to riparian lands without any restrictions or reservations in its conveyances, it has exclusive jurisdiction over the lands underlying nonnavigable bodies of water and may dispose of them without regard for the laws of the States in which said lands are situated. As such areas are lands belonging to the United States, deposits of the minerals specified in the act of February 25, 1920, *supra*, which occur in said lands are subject to disposition only in the manner prescribed in said

act. It seems clear, therefore, that prospecting permits and leases may be issued for lands below the meander lines of nonnavigable bodies of water separate from the abutting public lands, without regard for the laws of the State within whose boundaries they lie. Such patents or other conveyances as thereafter issue for the uplands must, of course, clearly show upon their face the limitations necessary to prevent the passing of the title to the lands below the meander lines, in accordance with the State laws.

In determining what portions of the beds of these lakes are yet owned by the United States, it will be necessary to ascertain what areas have passed to the riparian patentees, pursuant to the law of the State of Montana. The tracts remaining will be subject to disposal under the leasing act.

It again appears that the common law is applicable, as no specific provisions relating to riparian rights which are inconsistent with the common law, have been found by the Department. In view of the narrowness of these lakes it seems that the common law rule with respect to streams should be followed, namely, that the boundaries extend to a center line drawn through said lakes, at right angles from the meander line, with the use of converging lines only at the ends of said lakes, as was suggested in *Hardin v. Jordan, supra*, rather than the application of the rule followed where lakes are of a width comparable to their length. In such cases a center point is adopted and all boundaries determined by converging lines which meet at said point. *Olson v. Huntamer* (6 S. Dak., 364; 61 N. W. 479); *Shell et al. v. Matteson* (81 Minn., 38; 83 N. W., 491); *Scheifert et al. v. Briegel et al.* (90 Minn., 125; 96 N. W., 44).

These boundaries may be arrived at by agreement with the riparian owners of the lands adjoining the vacant lots of public land, and the applicant for prospecting permit must furnish such agreement for the approval of the Department before a permit will be issued.

The Commissioner's decision is modified to conform to the views herein expressed, and the record returned for the action herein directed. The case of *Clayton Phebus, supra*, is overruled in so far as it is inconsistent with the rules stated in this case.

**ANDREW A. MALCOLM.**

*Decided February 23, 1924.*

**PATENT—LAKE—RIPARIAN RIGHTS—MINERAL LAND—SALINE LAND.**

An unrestricted patent issued by the Government, conveying lands abutting on a nonnavigable lake, divests it of all title to or interest in the lake bed, including minerals therein, and the extent of the title of the riparian proprietor is thereafter to be determined in accordance with the laws of the State in which the lands lie.

## RIPARIAN RIGHTS—LAKE—MONTANA.

Montana has specifically adopted by statute the common-law rule of ownership by riparian proprietors of lands underlying nonnavigable bodies of water wherever not inconsistent with its constitution, or the constitution and statutes of the United States.

## PATENT—LAKE—MONTANA—RIPARIAN RIGHTS.—SALINE LAND—PROSPECTING PERMIT—LAND DEPARTMENT—JURISDICTION.

A patent conveying title without reservation to public lands abutting upon a nonnavigable lake in the State of Montana includes, in accordance with the common law, the lake bed as appurtenant to the uplands, and the fact that it has been the settled policy of Congress to reserve saline lands from disposal, except pursuant to special laws, does not confer upon the Land Department any jurisdiction thereafter to issue a permit to prospect for sodium in the bed of the lake.

## MINERAL LAND—SALINE LAND—LAKE—PATENT—RIPARIAN RIGHTS.

The rule that the known mineral character of public lands which have not been reported, withdrawn, or classified as mineral, must be determined as of the time when the claimant has completely fulfilled the requirements of the law under which he claims, in order that mineral deposits may be reserved to the United States, is as applicable to lands in lake beds which the Government knows will pass to the riparian proprietor as appurtenant to the upland, as it is to the upland itself.

FINNEY, *First Assistant Secretary*:

Andrew A. Malcolm has appealed from the decision of the Commissioner of the General Land Office, dated August 2, 1923, which rejected his application for a permit to prospect for sodium, filed pursuant to the act of February 25, 1920 (41 Stat., 437), for certain lands in the Glasgow, Montana, land district, within the meandered lines of three small lakes, for the reason that the abutting uplands have been patented under the homestead laws, and title to the lake beds had vested in the riparian owners.

The uplands were surveyed and plats thereof approved on May 7, 1909. Said lands were patented under the homestead laws without any mineral reservations, but with a reservation of the coal deposits, pursuant to the act of June 22, 1910 (36 Stat., 583).

Appellant apparently bases his appeal upon two main propositions: First, that the title to lands underlying the bed of nonnavigable streams or lakes remains in the United States, regardless of the laws of the State in which said lands are located; and, second, that although the lands within the meandered lines of a nonnavigable lake may pass by patent from the Government as appurtenant to the riparian lands unless said lake bed is excepted, nevertheless the long-established policy of the Government of reserving saline deposits is sufficient to constitute such an exception of the lands involved, which are alleged to contain deposits of sodium sulphate or Glauber salts.

This view was expressed in an oral presentation of the case by counsel for the appellant, who argued that the States were permitted to determine the disposition of public lands, under the rule followed by the Commissioner.

The question as to what law should be applied with respect to title to lands in beds of nonnavigable lakes, where the uplands were patented by the United States to its citizens, was decided by the Supreme Court in the case of *Hardin v. Jordan* (140 U. S. 371). The court quoted with approval from *Middleton v. Pritchard*, 3 Scammon, 510, as follows:

The United States have not repealed the common law as to the interpretation of their own grants, nor explained what interpretation or limitation should be given to, or imposed upon the terms of the ordinary conveyances which they use, except in a few special instances; but these are left to the principles of law, and rules adopted by each local government, where the land may lie. and added:

In our judgment the grants of the Government for lands bounded on streams and other waters, without any reservation or restriction of terms, are to be construed as to their effect according to the law of the State in which the lands lie.

The views stated in *Hardin v. Jordan*, *supra*, on this point have been consistently adhered to by the Supreme Court in its subsequent decisions. *Mitchell v. Smale* (140 U. S., 406); *Kean v. Calumet Canal and Improvement Company* (190 U. S., 452). In the case of *Hardin v. Shedd* (190 U. S., 508), the Supreme Court said, as to the interpretation of grants of lands adjoining nonnavigable lakes:

In the case of land bounded on a nonnavigable lake the United States assumes the position of a private owner subject to the general law of the State, so far as its conveyances are concerned. *Hardin v. Jordan*, 140 U. S. 371; *Shively v. Bowlby*, 152 U. S. 1, 45; *Grand Rapids & Indiana R. R. Co. v. Butler*, 159 U. S. 87, 90, 93; *St. Anthony Falls Water Power Co. v. St. Paul Water Commissioners*, 168 U. S. 349, 363.

In the later case of *Wilson and Company v. United States* (245 U. S., 24), the Supreme Court stated the applicability of State law, as expressed in *Hardin v. Jordan*, *supra*, and like cases, as representing an indisputable state of the law because conclusively settled by previous decisions.

The uniform practice of the Department, since the decision of the court in *Hardin v. Jordan*, *supra*, has been to regulate its disposal of lands forming the beds of nonnavigable lakes in harmony with the provisions of the law of the State in which the lands were located, as to the effect of patents and grants of the abutting uplands. *John P. Hoel* (13 L. D., 588), *Instructions of January 12, 1892* (14 L. D., 119), *Amanda Hines* (14 L. D., 156), *F. M. Pugh et al.* (14 L. D., 274), *Clayton Phebus* (48 L. D., 128).

This appellant's claim on this point is unsupported by any citation of law or allegation of fact which convinces the Department that it is at liberty to give to its patents any interpretation inconsistent with the rules so clearly and repeatedly stated by the highest judicial tribunal of the land.

That the law of Montana follows the common-law rule of ownership by riparian owners of lands underlying nonnavigable bodies of water appears from section 3552 of the Code of Montana, which specifically adopts the common law of England as controlling wherever not inconsistent with the constitutions of the United States and the State of Montana, and their statutes. No such inconsistencies appear on this point.

There remains the suggestion that the Government, by virtue of its admitted policy of reserving salines from grants of its public land, reserved the beds of the lakes in question which are alleged to contain deposits of sodium.

This suggestion is based upon an assumption that the lands in the beds of the lakes may be considered as separate from the uplands, and excepted from the operation of patents upon some considerations different from those with respect to the upland.

Such does not appear to the Department to be the case. Lands in Montana which are covered by the waters of a nonnavigable lake pass, in accordance with the common law, as appurtenant to the uplands when said uplands are patented, unless there is an *express* provision in the patent to the contrary. *Hardin v. Jordan, supra*. As was pointed out in the case of *Kean v. Calumet Canal and Improvement Company* (190 U. S., 452), the Government, having knowledge of the laws of each of the States with respect to the construction of grants and patents, may, *by the form of its conveyance*, pass only such estates as it desires.

Admitting that it has been and is the policy of the Congress, as reflected in its laws, to reserve saline lands from disposal except pursuant to special statutes, nevertheless it is well settled that the conveyances by the Government of riparian lands will be tested by the laws of the State in which the land is located, as would a like conveyance by an individual; and any of its policies or general practices not reflected in a patent will not alter the effect of the patent, or permit further disposal of, or jurisdiction over, lands so conveyed, whether upland or lake bed. Such subsequent attempted disposals were severely condemned by the Supreme Court in the case of *Jeffries v. East Omaha Land Company* (134 U. S., 178).

The issuance of a patent, without a mineral reservation or reservation of any other character, is a determination by the Land Department that the lands are of a character contemplated by the law under which the patent issued, and may only be set aside be-

cause of fraud or mistake in its issuance. *Davis's Administrator v. Weibbold* (139 U. S., 507).

The state of the law with respect to title to the lands in the beds of these lakes was well settled when the patents by the Government were issued; and its failure to limit these patents in some respect so as to exclude the beds of these lakes indicates, *prima facie*, that they were not known to contain sodium sulphate at that time.

It is also well settled that the known mineral character of public lands which have not been reported, withdrawn, or classified as mineral, must be determined as of the time when the claimant has completely fulfilled the requirements of the law under which he claims, in order that mineral deposits may be reserved to the United States in any patent, certification, or approved list which it may issue. *State of Wyoming et al. v. United States* (255 U. S., 489). The foregoing rule is as applicable to lands in lake beds, which the Government knows will pass as appurtenant to the upland, by virtue of the laws of the State in which they are located, as is said with respect to the upland itself.

This applicant requests a permit to *prospect for* sodium sulphate, which indicates that the actual existence of said deposits is not known at present; and if such be the case, there can be no question that the patents for the uplands were properly issued without any reservation or exclusion of the lake beds, and not through fraud or mistake.

From these conditions the Department is convinced that it is without jurisdiction to issue prospecting permits for the lands in the bed of these lakes, which lands have become the property of the abutting owners.

In view of the uniformity with which the courts and the Department have expressed and adhered to the principles stated herein, it must be held in this case that, as the title to the lake bed has passed from the Government, appellant's permit application was properly rejected.

The decision of the Commissioner is affirmed, and the case is closed.

### MARCUS v. GRAY ET AL.

*Decided February 23, 1924.*

OIL AND GAS LANDS—WITHDRAWAL—HOMESTEAD ENTRY—SURFACE RIGHTS—PATENT—EVIDENCE—BURDEN OF PROOF.

A published report by the Geological Survey that lands are prospectively valuable for oil or gas is sufficient to warrant their withdrawal for such deposits, and one who afterwards enters them under a nonmineral land law must either consent to take a restricted patent in accordance with the provisions of section 3 of the act of July 17, 1914, or assume the

burden of proof and show that the lands are in fact nonmineral in character.

**OIL AND GAS LANDS—WITHDRAWAL—HOMESTEAD ENTRY—SURFACE RIGHTS—LAND DEPARTMENT—LACHES.**

A report by the Geological Survey that land is prospectively valuable for oil or gas is, as to its effect upon a subsequent nonmineral entry, tantamount to a withdrawal, and administrative delay by the Government in following up the report with a withdrawal or classification of the land until after an entry had been allowed and compliance with the homestead law completed, does not relieve the entryman from fulfillment of the requirements of the act of July 17, 1914.

**COURT AND DEPARTMENTAL DECISIONS CITED AND APPLIED.**

Cases of *Washburn v. Lane* (258 Fed., 584), *Columbus C. Mabry*, on rehearing (48 L. D. 280), and *State of Utah v. Lichliter et al.* (50 L. D., 231), cited and applied.

**FINNEY, *First Assistant Secretary*:**

Appeal has been filed by Jesse Marcus from the decision of the Commissioner of the General Land Office, dated March 21, 1923, which required him to consent to the amendment of his enlarged homestead entry for the E.  $\frac{1}{2}$ , Sec. 18, T. 10 N., R. 39 E., M. P. M., Miles City, Montana, land district, so as to reserve the oil and gas deposits in said land to the United States, in accordance with the act of July 17, 1914 (38 Stat., 509).

Marcus filed homestead application on June 2, 1920, and his entry was allowed on December 6, 1920, without a reservation of the oil and gas deposits, the said land being neither withdrawn nor classified as mineral at that time. Although there was filed on October 18, 1920, an application by Walter R. Gray, Roy Hutchinson, Harry C. Allen, Edward A. Cornwell, John H. Matney, jr., and James E. Monahan, for a permit to prospect for oil and gas upon the land involved, pursuant to the leasing act of February 25, 1920 (41 Stat., 437), the Commissioner did not proceed to adjust these conflicts in accordance with section 12(c) of the regulations of March 11, 1920 (47 L. D., 437), until March 21, 1923. The entryman had in the interval, on June 24, 1920, completed final proof on his entry.

In his decision of March 21, 1923, the Commissioner called upon the entryman to consent to the amendment of his entry pursuant to the act of July 17, 1914 (38 Stat., 509), as to oil and gas, citing as a basis therefor a report by the Director of the Geological Survey, dated March 1, 1923, that—

The records of the Geological Survey indicate that the geologic conditions affecting the land involved in this application were such as to warrant its classification as valuable for deposits of oil and gas on June 23, 1921.

and held said entry for cancellation unless the mineral waiver should be filed.

It is claimed in this appeal that the Department is without authority to require the waiver of oil and gas deposits, and further that if such waiver is required appellant is entitled to a hearing to disprove any classification of the land as mineral.

The Geological Survey report was based upon data referred to in a further report rendered December 22, 1923, in which it was stated:

This land is situated on Porcupine Dome, a major anticlinal uplift in east-central Montana, in which the structural and stratigraphic conditions are considered to be favorable for oil and gas accumulation. The structure mentioned was detected by Survey geologists in 1914, and its oil possibilities are discussed in Survey Bulletin No. 621 f, published September 24, 1915.

To date four wells ranging in depth from 1200 to 1760 feet, all of which have yielded showings of oil and gas have been completed on this structure, and a fifth, in which showings of gas have been reported has been drilled to a depth of 1400 feet and according to last accounts is to be drilled to the deeper sands.

These data are not sufficient to charge the entryman, at the time of final proof, with knowledge that the land is, in fact, mineral in character. They do, however, indicate that, prior to the filing of appellant's homestead application, the Government had examined the land, and had published, in Survey Bulletin No. 621 f, a summary of its observations. Said report described the land as *prospectively* valuable for oil and gas in the following terms:

\* \* \* the existence of oil or gas in this field is at present merely conjectured from the favorable structure and the fact that formations of the same age and character as those represented here are known to contain oil in other places.

The fact that lands have prospective value for oil and gas is sufficient to warrant their withdrawal as valuable for such deposits, and is a proper basis for the issuance of a restricted patent pursuant to the act of July 17, 1914, *supra*. State of Utah *v.* Lichliter *et al.* (50 L. D., 231); Foster *v.* Hess (50 L. D., 276).

The act of July 17, 1914, *supra*, authorizes, in section 3 thereof, the issuance of limited patents under nonmineral land laws where lands have been "withdrawn, classified or reported as being valuable for" oil or gas. These provisions seem to contemplate a reservation of minerals to the United States (1) wherever the existence of the minerals has been shown, and the lands classified as such; (2) wherever the existence of minerals seems probable, and such prospective value has prompted a withdrawal of the land; and (3) wherever there has not been a formal withdrawal or classification, but a report has been made of facts which would warrant a withdrawal or classification of land as mineral. Reports of this character by agencies of the Government are clearly of the kind contemplated by the act of July 17, 1914, *supra*; and in the present case the entryman could properly have been required to consent to the amendment of his entry from the time of its inception, so as to reserve the deposits of oil and gas

to the United States. Administrative delay by the Government, or its failure to follow up the report with a withdrawal or classification of the land as valuable for oil or gas until after entry had been made and compliance with the homestead law completed, does not alter the situation. The report, in view of the provisions of the act of July 17, 1914, *supra*, was as effective as a withdrawal or classification.

The only error perceived in the Commissioner's decision is that the appellant was not afforded the privilege guaranteed by section 2 of the act of July 17, 1914, *supra*, of disproving the report. Procedure on this point should have been in accordance with section 12(c) of the leasing regulations, *supra*, and the regulations of March 20, 1915 (44 L. D., 32), whereunder appellant is entitled to apply for reclassification of the land, and in the event of its denial may apply for a hearing at which he will assume the burden of disproving the *prima facie* mineral character of the land. This presumption of mineral character is raised by the report of prospective mineral value, which has, as shown, the legal effect of a withdrawal or classification under the act of July 17, 1914, *supra*. It is well settled that a withdrawal impresses land with a *prima facie* mineral character. *Washburn v. Lane* (258 Fed., 584); *Columbus C. Mabry* (48 L. D., 280).

The Commissioner's decision is modified to conform to the views herein expressed, and the case remanded for further action in conformity herewith.

### SEWELL M. CORBETT.

*Opinion, February 27, 1924.*

#### MINING CLAIM—IMPROVEMENTS—FORFEITURE—MILITARY SERVICE.

The joint resolution of July 17, 1919, which, under certain specified conditions, exempted owners of mining claims who entered the military or naval service of the United States during the war with Germany, from the forfeiture penalty imposed for nonperformance of annual assessment work by section 2324, Revised Statutes, did not contemplate extension of its application substantially beyond the date of the establishment of a status of peace.

#### MINING CLAIM—IMPROVEMENTS—ADVERSE CLAIM—NOTICE—LAND DEPARTMENT—COURTS—JURISDICTION.

Disputes between rival claimants relating to the fulfillment by mining locators, or their successors in interest, of the legal requirements as to performance of annual assessment work, or relating to the filing of notices in compliance with a relief statute with a view to holding claims without the performance of such work, are not, generally, matters for departmental determination, but come exclusively within the jurisdiction of the courts.

#### FINNEY, *First Assistant Secretary*:

In your letter of January 16, 1924, addressed to the Secretary of the Interior you ask whether your failure to file the notices required by the proviso to the joint resolution of July 17, 1917 (40 Stat., 243),

would preclude the relocation by another of ground embraced in 32 lode mining claims situate in the State of New Mexico, purchased and relocated by you after the declaration of war by the United States against Germany, and while you were an officer in the United States Army, upon which claims you have performed no work for several years, and with respect to which, as you are advised, no notices of the character above referred to have been filed. The statute cited reads as follows:

Joint Resolution To relieve the owners of mining claims who have been mustered into the military or naval service of the United States as officers or enlisted men from performing assessment work during the term of such service.

*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,* That the provisions of section twenty-three hundred and twenty-four of the Revised Statutes of the United States, which require that on each mining claim located after the tenth day of May, eighteen hundred and seventy-two, and until patent has been issued therefor, not less than \$100 worth of labor shall be performed or improvements made during each year, shall not apply to claims or parts of claims owned by officers or enlisted men who have been or may, during the present war with Germany, be mustered into the military or naval service of the United States to serve during their enlistment in the war with Germany, so that no mining claim or any part thereof owned by such person which has been regularly located and recorded shall be subject to forfeiture for nonperformance of the annual assessments during the period of his service or until six months after such owner is mustered out of the service or until six months after his death in the service: *Provided*, That the claimant of any mining location, in order to obtain the benefits of this resolution, shall file, or cause to be filed, a notice in the office where the location notice or certificate is recorded, before the expiration of the assessment year during which he is so mustered, giving notice of his muster into the service of the United States and of his desire to hold said mining claim under this resolution.

The said statute does not in terms comprehend officers in the permanent establishment of the United States Army at the time of the declaration of war by the United States against Germany, and who, surviving the war, would be separated from the Army, if at all (except by death), only by a process or procedure other than that known as a muster out, yet, conceding, but without the Department's being understood as expressing an opinion on that particular phase, that it would be susceptible of a construction favorable to such officers, the Department is of opinion that the legislation could not in any event be reasonably held to contemplate its application to a period extending substantially beyond the date of the establishment of a status of peace between the two countries, to the benefit of such officers who may own mining claims located by them prior to or during the war, whether, in the absence of the performance of annual assessment work thereon, notices or certificates such as those required by the joint resolution to be filed, were filed or not. A contrary hold-

ing would, as you can readily observe, wholly overlook the purpose of the resolution, and result in the unreasonable conclusion that an officer, such as you were at the beginning of the war, and still remain, might hold his claims so located without the performance of any work whatsoever thereon or therefor, with no use or benefit to the public and in positive detriment to the Government, by electing to remain and remaining in the service until his enforced retirement therefrom after a lapse of many years on account of age.

It would seem from the recitals in your letter that for a period commencing several years prior to the date thereof you have performed no work on any of the claims referred to, and that in the meantime adverse relocations have been made of the ground. It is the Department's belief therefore, that that fact, irrespective of your failure to file during those years, notices or certificates in lieu of the performance of annual assessment work, rendered the ground subject to relocation by any qualified person, and that if locations otherwise valid have been made of the ground, your claims have thereby become lost and forfeited, under the provisions of section 2324, Revised Statutes.

It should be added, however, that the questions relating to the fulfillment by mining locators or their successors in interest of the legal requirements as to the performance of annual assessment work, or as to filing of notices or certificates with a view to holding claims without the performance of such work, are not, generally, subject to departmental determination, but, with exceptions not here present, are matters between rival or adverse claimants to the same mineral land, and go only to the right of possession, the determination of which is committed exclusively to the courts.

### CHARLES O. STANLEY.

*Decided February 28, 1924.*

#### COAL LANDS—LEASE.

Section 4 of the act of February 25, 1920, which gives the Secretary of the Interior authority to grant a second coal lease to a lessee when it is shown that all of the workable coal deposits covered by the first lease will be exhausted within three years thereafter, provided that the aggregate areas do not exceed 2560 acres, contemplates the granting of a second lease prior to the expiration of the original lease, and this provision for the taking and holding of more than one lease is one of the exceptions referred to in the excepting clause of section 27 of that act.

#### COAL LANDS—LEASE—PROSPECTING PERMIT.

Section 4 of the act of February 25, 1920, which authorizes the granting of a second coal lease to a lessee through the same procedure and under the same conditions as in case of an original lease, includes the authority to grant a prospecting permit as preliminary to a lease.

## COAL LANDS—LEASE—PROSPECTING PERMIT—PREFERENCE RIGHT.

An applicant for a coal prospecting permit under section 4 of the act of February 25, 1920, does not acquire any preference right to a permit by virtue of the fact that he is operating under a lease of other public coal lands.

## COAL LANDS—LEASE—PROSPECTING PERMIT—CONTIGUITY.

The authority conferred upon the Secretary of the Interior by section 4 of the act of February 25, 1920, to grant a second coal lease or a prospecting permit to a lessee when it is shown that all of the workable deposits covered by the original lease will be depleted within three years thereafter, is not limited to contiguous lands.

## COAL LANDS—SECTION 27, ACT OF FEBRUARY 25, 1920—WORDS AND PHRASES.

The word "herein," as used in the exception clause of section 27 of the act of February 25, 1920, has reference to the leasing act as a whole and not merely to the section in which it is used.

## DEPARTMENTAL DECISION CITED AND APPLIED.

Case of Charles H. Loud (50 L. D., 151, 153), cited and applied.

FINNEY, *First Assistant Secretary*:

Charles O. Stanley, who holds a coal lease issued on November 24, 1922, pursuant to the act of February 25, 1920 (41 Stat., 437), for the SE.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , Sec. 32, T. 32 S., R. 65 W., 6th P. M., Pueblo, Colorado, land district, has appealed from the decision of the Commissioner of the General Land Office, dated October 20, 1923, rejecting his application for a coal prospecting permit under said act for the SW.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , Sec. 29; S.  $\frac{1}{2}$ , Sec. 30; N.  $\frac{1}{2}$  N.  $\frac{1}{2}$ , SW.  $\frac{1}{4}$  NW.  $\frac{1}{4}$ , Sec. 31; NW.  $\frac{1}{4}$  NW.  $\frac{1}{4}$ , Sec. 32, in the same township.

The Commissioner held that, as a coal prospecting permittee under the leasing act of February 25, 1920, *supra*, is entitled to a coal lease upon discovery of workable deposits of coal, the issuance of a permit to Stanley is prohibited by the provision of section 27 of the said act, which reads—

That no person, association, or corporation, except as herein provided, shall take or hold more than one coal, phosphate or sodium lease during the life of such lease in any one State, \* \* \*;

The appellant claims that the lease held by him covers only about 19 acres of coal land, which, at his present rate of production of 4000 tons per month, will be exhausted in about two years; that prospecting operations are necessary before a lease of the additional lands described may properly be issued, and that the issuance of a permit is authorized by the provisions of sections 3 and 4 of the leasing act. These sections provide—

Sec. 3. That any person, association, or corporation holding a lease of coal lands or coal deposits under this Act may, with the approval of the Secretary of the Interior, upon a finding by him that it will be for the advantage of the lessee and the United States, secure modifications of his or its original lease by including additional coal lands or coal deposits contiguous to those em-

braced in such lease, but in no event shall the total area embraced in such modified lease exceed in the aggregate two thousand five hundred and sixty acres.

Sec. 4. That upon satisfactory showing by any lessee to the Secretary of the Interior that all of the workable deposits of coal within a tract covered by his or its lease will be exhausted, worked out, or removed within three years thereafter, the Secretary of the Interior may, within his discretion, lease to such lessee an additional tract of land or coal deposits, which, including the coal area remaining in the existing lease, shall not exceed two thousand five hundred and sixty acres, through the same procedure and under the same conditions as in case of an original lease.

The records disclose that the tracts desired to be prospected are separated from the area now under lease by approximately one mile of land, title to which has passed from the United States both as to surface and coal deposits. It also appears that all of the lands described in the permit application, except the SW.  $\frac{1}{4}$  NW.  $\frac{1}{4}$ , Sec. 31, are included in an application for a similar permit, filed by Giacomo Toller on October 24, 1922, now suspended pending the filing of a proper bond.

The inapplicability of section 3 of the act is apparent from the fact that the tract in the original lease and those in the permit application are not contiguous, nor are they shown to be so located that the operations can be carried on as a single mine or unit, within the purview of section 6 of said act which provides—

That where coal or phosphate lands aggregating two thousand five hundred and sixty acres and subject to lease hereunder do not exist as contiguous areas, the Secretary of the Interior is authorized, if, in his opinion the interests of the public and of the lessee will be thereby subserved, to embrace in a single lease noncontiguous tracts which can be operated as a single mine or unit.

Section 4 of the leasing act does not require that the additional lands to be leased be contiguous to, nor indeed in the vicinity of, the lands in the original lease. Said section clearly authorizes the issuance of a second lease before the expiration of the first one, subject to the limitation that the deposits under the first lease must be so depleted that operations can not continue for more than three years under the said lease and with a further limitation to an area in the second lease which, together with the coal producing area remaining under the first lease, will not exceed 2560 acres. This provision for the taking and holding of more than one lease in a State is clearly one of the cases within the excepting clause of section 27 of the act, which reads, "except as herein provided", the word "herein" evidently referring to the leasing act as a whole and not to the section in which it is used, as there is no further provision with respect to coal, phosphate, or sodium in said section.

The purpose of said section 4 of the leasing act is apparently to enable a party, once engaged in the mining of coal upon the public

domain, to be able, with a reasonable margin of time, to acquire an additional lease and to be in a position to commence operations thereunder at about the time the deposits in the land first leased are exhausted, thus preventing delays and a break in the continuity of operations which would prove costly, and perhaps ruinous to the lessee. The curb on monopolistic acquisitions expressed in section 27 of the leasing act, is made effective in section 4 by the limitation as to acreage, which fact further indicates said section to be intended as an exception to the limitations stated in section 27 of said act.

There remains the question whether a prospecting permit may be issued to Stanley under the authority expressed in section 4 of the leasing act.

The Commissioner correctly stated the views of the Department when he held that the same limitations apply to prospecting permits as to leases issued under the act of February 25, 1920. Charles H. Loud (50 L. D., 151, 153). It also seems clear that if such be the case, a permit may be issued, under the conditions prescribed in the act, whenever a lease is authorized by said act. In this connection the concluding words of section four of the act "the Secretary may lease an additional tract of land \* \* \* *through the same procedure and under the same conditions as in case of an original lease,*" [Italics supplied] are especially pertinent. Under this provision a lease may be issued, as well, under the right given in section 2 of said act, to permittees, as to the highest bidder under the other leasing provisions of said act and the regulations thereunder.

An applicant for a prospecting permit gains no preference or priority rights by virtue of the fact that he is then operating under a lease for other lands and desires said permit in the exercise of the privilege conferred by section 4 of the leasing act, and where there is a prior application for a coal prospecting permit of record his application for permit must be rejected unless it is found that a permit may not be issued to the prior claimant. That such is the case clearly appears from the before quoted conclusion of section 4 of said act, which makes it incumbent upon the original lessee to secure the second lease as though the first did not exist.

There being an adverse prior application this appellant's application will stand suspended until it is determined whether a permit may be issued to the prior claimant, and if such permit may be issued, appellant's application will be rejected to the extent of its conflict with the prior application. No objection appears to the issuance of a permit for the remaining land.

The Commissioner's decision is modified to conform to the views herein expressed and the records are returned to the General Land Office for further action.

J. M. HUDSON.<sup>1</sup>*Decided February 19, 1924.*

## REPAYMENT—HOMESTEAD ENTRY—COAL LANDS—RELINQUISHMENT—WITHDRAWAL—ACT OF MARCH 26, 1908.

A claim for repayment based upon a relinquishment of a homestead entry after March 3, 1909, and subsequently to the inclusion of the land within a coal withdrawal rather than accept a surface patent, comes within the purview of the act of March 26, 1908, and must be filed within the statutory period specified in the act of December 11, 1919.

FINNEY, *First Assistant Secretary*:

J. M. Hudson has appealed from a decision of the Commissioner of the General Land Office dated September 28, 1923, denying repayment of moneys paid in connection with homestead entry 01498, Helena, Montana, land district.

Repayment is claimed for the alleged reason that claimant relinquished the entry subsequent to its inclusion in a coal withdrawal rather than accept a surface patent. It appears from the record that the entry was made in 1902 and the land embraced therein was included in a coal withdrawal of 1906. Claimant relinquished the entry in 1909. Application for repayment was filed in August, 1922. In support of the application, claimant made affidavit to the effect that the inclusion of the land in such withdrawal was the immediate cause of the relinquishment. The record has been examined and it appears that claimant would be entitled to repayment on the showing made had he filed his claim within the time provided by the act of December 11, 1919 (41 Stat., 366). It is contended that the claim should be held to come within the provisions of the repayment act of June 16, 1880 (21 Stat., 287). Such contention can not be upheld as the entry was not erroneously allowed when made and it could have been confirmed as to a surface patent under the act of March 3, 1909 (35 Stat., 844). The claim clearly comes within the purview of the act of March 26, 1908 (35 Stat., 48), for the reason that while claimant might accept a surface patent if he desired to do so, yet he was not compelled to accept such patent and a relinquishment of the entry rather than the acceptance of a surface patent would be tantamount to a rejection thereof within the meaning and intent of said act of March 26, 1908, *supra*. See Thomas A. Shepard, 46 L. D., 251. However, the application for repayment was not filed until August, 1922, and is barred by the provisions of the act of December 11, 1919, *supra*. For such reason the action of the Commissioner in denying repayment is affirmed.

<sup>1</sup> See decision on rehearing, page 298.

## J. M. HUDSON (ON REHEARING).

Decided March 8, 1924.

## REPAYMENT—HOMESTEAD ENTRY—COAL LANDS—ACT OF JUNE 16, 1880.

Where an entry, allowed unconditionally, may be confirmed as to a surface patent, such entry is not one "erroneously allowed" within the contemplation of section 2 of the repayment act of June 16, 1880.

—GOODWIN, *Assistant Secretary*:

J. M. Hudson has filed motion for rehearing of departmental decision of February 19, 1924 (50 L. D., 297), denying his application for repayment of moneys paid in connection with homestead entry 01498, Helena, Montana, land district.

It is contended in the motion that the Department erred in not holding that repayment in the instant claim was warranted under the act of June 16, 1880 (21 Stat., 287), for the reason that the entry could not be confirmed in its entirety. In support of such contention the departmental rulings in the unreported cases of Charles Hoepfner, A. 4326, decided May 17, 1923, and Robert J. H. Capps, Pueblo 08103, decided July 31, 1923, are cited.

The record has been examined and in the opinion of the Department the motion presents no sufficient reason for disturbing the action heretofore taken. The facts in the Hoepfner case are materially different from those in the instant case. In said case the entry was made in 1902 and the land embraced therein was included in a coal withdrawal in 1906. The entry was canceled on default in 1908. Hoepfner stated that he allowed such default judgment to be taken against him by reason of the inclusion of the land within such coal withdrawal. The Department allowed an application for repayment under said act of June 16, 1880, for the reason that at the date of the cancellation of the entry there existed no law under which entryman could accept a surface patent and therefore the entry could not be confirmed as having been made for mineral land, the coal withdrawal being *prima facie* evidence of the mineral character of the land.

In the case of Robert J. H. Capps, Pueblo 08103 (not Charles C. H. Japp as cited by counsel) the facts are not correctly stated by counsel. In that case final certificate issued upon a timber and stone application in January, 1907, for land which had been included in a coal withdrawal in October, 1906. The Department allowed repayment under the act of June 16, 1880, for the reason that the entry was erroneously allowed and could not be confirmed as the land had been withdrawn as coal land at the date the entry was made.

No such facts exist in the instant case. The correct rule applicable to same is correctly stated in the decision complained of, as it is

evident that if the entry was subject to confirmation as to a surface patent it was not erroneously allowed and, if claimant did not desire surface patent, relief is provided by the act of March 26, 1908 (35 Stat., 48), under the rule announced in the Sheppard case (46 L. D., 251).

The motion for rehearing is accordingly denied.

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## RECORDS—NOTATION OF CANCELLATIONS.

### INSTRUCTIONS.

[Circular No. 915.]<sup>1</sup>

DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE,  
*Washington, D. C., February 5, 1924.*

### REGISTERS AND RECEIVERS,

### UNITED STATES LAND OFFICES:

Inasmuch as valuable rights are often dependent upon ascertaining the exact time when orders of cancellation are noted on the tract book, the following rules are prescribed:

In noting the cancellation of an entry, prospecting permit, lease, selection, etc., the tract book will show the date and initial (division) of the letter of cancellation. The date and hour of the notation on the tract book will be immediately noted on the letter and on the serial register. In reporting the status of cases in connection with which the cancellation of a prior claim is material, you will report the time such cancellation was noted on the tract book.

When relinquishments of entries or withdrawals of applications are filed, the hour of filing should be noted on the serial register as well as on the paper filed.

WILLIAM SPRY,  
*Commissioner.*

Approved:

E. C. FINNEY,  
*First Assistant Secretary.*

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## EMMANUEL FRAGESKAKIS ET AL.

*Decided March 5, 1924.*

### COAL LANDS—PREFERENCE RIGHT—NOTICE—IMPROVEMENTS—POSSESSION—STATUTES.

Section 2349, Revised Statutes, does not require that a coal declaratory statement or notice setting up a preference-right claim must be filed within sixty

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<sup>1</sup>Amended as to oil and gas prospecting permits, April 23, 1924. See Circular No. 929 (50 L. D., 387).

days from the date that possession was first declared, but contemplates that the sixty-day period begins to run at the time of the opening of a mine of coal and the commencement of improvements thereon, accompanied by actual possession of the land.

**COAL LANDS—PREFERENCE RIGHT—NOTICE—ADVERSE CLAIM—SECTION 2349, REVISED STATUTES.**

A coal declaratory statement which is not filed within sixty days from the accrual of a preference right as required by section 2349, Revised Statutes, but which is presented within the ensuing year, affords the declarant, in the absence of an intervening adverse right asserted at the time of the filing or other disposition of the land, the same security for the period specified in the statute as if it had been filed in time.

**COAL LANDS—APPLICATION—PURCHASE—NOTICE—RECORDS—PAYMENT—HOMESTEAD ENTRY.**

The acts of one in taking and maintaining possession of a tract of public land and opening a mine of coal thereon, coupled with acts of the local officers in accepting his application to purchase, permitting publication and proof, and requiring payment of the purchase price, constitutes an appropriation of the land, duly recognized and noted of record, sufficient to preclude the subsequent allowance of a homestead entry.

**HOMESTEAD ENTRY—CITIZENSHIP—COAL LANDS—POSSESSION—ADVERSE CLAIM—SURFACE RIGHTS.**

The erroneous allowance of a homestead entry, subsequently canceled because of want of citizenship qualification of the entryman, does not affect the surface rights of an applicant to purchase the land under the coal-land laws who had, prior to the cancellation, appropriated the land by taking and maintaining possession thereof and opening a mine of coal thereon.

**DEPARTMENTAL DECISIONS CITED AND APPLIED.**

Cases of Charles S. Morrison (36 L. D., 319), McKenna *v.* Seymour (47 L. D., 395), and J. T. Williams and John Blathran (48 L. D., 176), cited and applied.

**FINNEY, *First Assistant Secretary*:**

On February 11, 1919, Emmanuel Frageskakis filed his coal declaratory statement, serial 023882, under section 2348, Revised Statutes, for the SE.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ , E.  $\frac{1}{2}$  SE.  $\frac{1}{4}$ , SW.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , Sec. 18, T. 13 S., R. 9 E., Salt Lake City land district, Utah, alleging that he had on November 4, 1918, opened a mine of coal on the land by driving a tunnel 18 feet deep by 8 feet wide, and had expended \$75 in labor and improvements. On November 3, 1919, he filed his application to purchase said lands, alleging an expenditure of \$550 in the construction of the tunnel 5 by 6 by 18 feet, and an open cut 4 feet by 8 feet long.

On August 7, 1919, Henry A. Wallace and John M. Wallace, as an association, filed their coal declaratory statement, serial 024670, for the E.  $\frac{1}{2}$  SW.  $\frac{1}{4}$ , SW.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , W.  $\frac{1}{2}$  SE.  $\frac{1}{4}$ , Sec. 18, NW.  $\frac{1}{4}$  NW.  $\frac{1}{4}$ , Sec. 19, T. 13 S., R. 9 E., and the SE.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , Sec. 13, NE.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ , Sec. 24, T. 13 S., R. 8 E., S. L. M., alleging actual possession of said land and the opening of a mine of coal on July 14, 1919, and the exposure of a 4 $\frac{1}{2}$ -foot bed of coal in an open cut 10 by 4 $\frac{1}{2}$  by 8 feet.

The local officers suspended this application pending the disposition of prior conflicting claims.

On June 29, 1922, the Wallaces filed their application to purchase the said tracts, therein alleging the expenditure of \$350 in an opening showing a face of coal 10 feet long, 6 feet high, and 4 feet wide, and another opening 15 by 6 by 4 feet, all timbered and showing a face of coal.

On January 21, 1920, Norman McCarty and Rufus C. Hill, as an association, filed their coal declaratory statement, serial 025298, for (as amended February 13, 1920) the SW.  $\frac{1}{4}$ , Sec. 17, E.  $\frac{1}{2}$  SE.  $\frac{1}{4}$ , Sec. 18, E.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , Sec. 19, T. 13 S., R. 9 E., alleging actual possession since, and the opening of a mine of coal on, January 11, 1920, and the expenditure of \$125 in extending a tunnel 10 feet exposing a coal vein  $6\frac{1}{2}$  feet in thickness and raising the tunnel a distance of 20 feet in rock. This application was suspended because of its conflict with that of Frageskakis.

The various tracts embraced in the several coal filings heretofore described were classified as coal land and appraised at prices ranging from \$55 to \$125 on March 18, 1911.

Application and petition for designation under the stock-raising homestead law, serial 019543, were made by Angelo Pilati on June 18, 1917, covering the E.  $\frac{1}{2}$  E.  $\frac{1}{2}$ , W.  $\frac{1}{2}$  SE.  $\frac{1}{4}$ , E.  $\frac{1}{2}$  SW.  $\frac{1}{4}$ , and lot 4, of said Sec. 18.

Designation of said land was made under said application and became effective May 25, 1920, and on September 8, 1920, the entry was allowed, and on January 22, 1922, the entry was canceled for failure to submit proper evidence of citizenship.

Frageskakis's application to purchase was accepted, and he made due proof of publication and posting. Notice was sent to him to make payment for the land on or before February 12, 1920. This he failed to do, and on February 14, 1920, the local officers rejected his application. During the period allowed for an appeal he requested the Commissioner of the General Land Office for an extension of time to make payment, alleging as grounds therefor personal illness, which request was treated as an appeal. The Commissioner by his letter of March 19, 1920, held that if adverse claimants did not object to the request for an extension, he would make none, that the two conflicting declaratory statements constituted no bar to the extension requested, and that rights under said declaratory statements might be asserted in response to notice, and he directed that Frageskakis be advised that he need not make payment until May 1, 1920. No objection was filed to the application for extension of time, nor was there any protest made during the period of publication. It appears that Frageskakis was not definitely or officially advised of

the extension allowed and remained in ignorance of such action until after the time for payment, as extended, had expired, and the purchase money was not tendered.

On November 13, 1920, Hill and McCarty filed an application for the designation of the SE.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ , Sec. 18, as a leasing unit.

By direction of the Commissioner all the papers relative to these several applications were transmitted to his office, and on May 20, 1920, upon consideration of the records, the Commissioner held, in effect, that the delinquency of Frageskakis, in making payment, was excusable under the circumstances; that the stock-raising homestead entryman's rights to the surface of the land were superior to those of the coal applicants; hence, their applications could be allowed only for the deposits, and suitable amendment must be made of their applications. The Commissioner further held applications 023882, 024670, 025298 for rejection; required, in the event the respective applications were allowed, that the applicants declare their intention to make payment for all or part of the land, specify the improvements they had made on each of the 40-acre tracts claimed by them, and file consent to have notations made on their applications so as to protect the surface entryman.

The claimants under serials 024670 and 025298 were permitted to file any protest they might desire against the application of Frageskakis.

In response to these requirements Frageskakis filed an affidavit detailing the work, improvements, and expenditures he had made on or in behalf of the land included in his declaratory statement. These statements are in substance as follows:

June, 1917, paid \$40 for surveying work upon the premises.

October, 1917, started to work on the SE.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ , Sec. 18, made a tunnel 7 by 9 by 20 feet, exposing 6 feet 8 inches of coal, ran another tunnel 5 feet, finding  $3\frac{1}{2}$  feet of coal, made roads to get to the property, all of which cost \$400.

January, 1918, had survey work made of the property, costing \$70.

June, 1918, constructed roads on the SE.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ , Sec. 18, for 2,500 feet to reach the property from the county road, made a tunnel 200 feet long, 8 by 14 feet, to reach coal.

Reservoir of cement constructed on the SE.  $\frac{1}{4}$  NW.  $\frac{1}{4}$ , Sec. 18, with a capacity of 6,000 gallons. One and a quarter inch pipe laid 3,000 feet under ground, to conduct water to the mine. Built tent-house; bought mine car and 500 feet of rails; equipped small blacksmith shop with necessary tools; bought plow, scrapers, team of horses, and wagon, and other implements, costing in all \$785.

From June to November 2, 1918, had from 5 to 14 men working on property which cost at least \$10,000.

On June 29, 1922, John M. and Henry A. Wallace filed a motion to reject Frageskakis's application, for the reason that his affidavit shows that the alleged improvements were made on the land prior to the date of his alleged first possession; because it was not shown that any improvements applicable under the coal land laws were made subsequent to November 4, 1918 (the date of the alleged first possession), or since February 11, 1919 (the date when Frageskakis's coal declaratory statement was filed); because it is not shown that Frageskakis had opened a valuable coal mine on the land under his aforesaid declaratory statement. With the motion is an affidavit, executed by John M. Wallace, who deposes, in substance, that he and his associate entered into possession of the land described in application 024670, on July 14, 1919, and opened up a valuable mine of coal on July 21, 1919; that prior to filing of their declaratory statement on August 7, 1919, they had expended \$100 in an open cut 10 feet long, 6 feet high, and  $4\frac{1}{2}$  feet wide, exposing  $4\frac{1}{2}$  feet of commercial coal, located on NE.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , Sec. 18; that subsequent to August 7, 1919, and prior to May 20, 1920, they had expended \$77 in an open cut 8 feet long, 6 feet wide, 6 feet high, exposing a good commercial vein of coal 5 feet, 5 inches in thickness on the said NE.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ ; that between July 1 and September 1, 1921, they had expended \$152 for a tunnel, 15 feet long, 5 feet high, 4 feet wide, exposing a 5-foot vein of commercial coal on the NW.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ . Consent is given by them to the making of appropriate notations upon any final certificate or patent issued to them for the lands to protect the surface entrants.

J. M. Wallace also alleges, *on information and belief*, that no improvements of any nature whatever were made on the land embraced in Frageskakis's application between the date of his alleged first possession on November 4, 1918, and the date of said affidavit; that such improvements were made long prior thereto, and not for the benefit of, or in connection with, said Frageskakis's coal declaratory statement. On July 5, 1922, a like motion was filed by Hill and McCarty, and a similar allegation on information and belief as to the failure of Frageskakis to make improvements subsequent to November 4, 1918. These applicants likewise consent to appropriate notations on their applications to protect the surface entrymen, and express the intent to pay for land they have applied for. Rufus C. Hill deposed that he and his associate entered into possession of the land embraced in their application 025298, on January 11, 1920, and opened a valuable mine of coal thereon; that they expended \$557, since possession was first had, in constructing two tunnels extending each 160 feet and showing faces of commercial coal 6 feet in thickness.

The Commissioner considered the various showings mentioned above, and, by his decision of May 23, 1923, he held the application

of Frageskakis for rejection upon the grounds that the claimant had not shown that he had either opened and improved a sufficient mine of coal or made a timely filing. The conclusions of the Commissioner were evidently based on his finding that more than 60 days had elapsed between the date of actual possession and the commencement of improvements, and the filing of the declaratory statement. He also appears to have accepted as an established fact the allegation of the adverse claimants, in their protest mentioned, that the improvements claimed by Frageskakis were made by others. On the same date the Commissioner held for rejection application 024670 upon the ground that a mine of coal had not been opened and improved by the claimants prior to February 25, 1920, the date of the enactment of the mineral leasing act. On the same date similar disposition was made of application 025298 upon the ground that the claimants had failed to specify, as previously required, the 40-acre tract or tracts upon which their improvements had been placed, and to show they had opened and improved a mine, and because of the bar caused by the application 023882.

The claimants, mentioned under serials 024670 and 025298, filed separate motions for reconsideration by the Commissioner of his decision rejecting their respective applications. Such papers were treated as appeals and have been forwarded to the Department.

Hill and McCarty have filed supplemental showings stating that all their improvements are situated on the NE.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , Sec. 17, and in contradiction of the last showing made by Frageskakis they have filed the affidavits of Orman W. Ewing and Robert A. Farley who state that they were on the land embraced in Frageskakis's application many times between November 6, 1918, and December 1, 1919, and know that Frageskakis did not, nor did anyone for him, set any timbers in any 20-foot tunnel or perform any labor or work of any nature thereon.

Frageskakis, in connection with his appeal to the Department, has filed a supplemental affidavit alleging, in substance, that his failure to mention in his previous showings the improvements and expenditures made after November 2, 1918, was due to inadvertence and misunderstanding; that he does not understand the English language very well and can not express himself clearly in such language; that his former affidavit was expressed in the English language, but that he did not study the same and presumed it contained all that was required by the Commissioner. He then sets forth additional expenditures and improvements made subsequent to November 2, 1918, and deposes that between November 6 and 23, 1918, he employed four men to cut, haul, and place in a 20-foot tunnel on his claim, 9 sets of timbers of 3 timbers each, for which

he paid \$286; that on November 8, 1918, a mining engineer made a survey and expert examination for the purpose of better locating the coal claims, and advised him intelligently where operations and developments should be made; that between May 8 and 14, 1919, he paid \$36, chiefly for repairing roads and trails leading to said tunnel wherein a coal vein 6 feet 8 inches was exposed; and that he did other repair work about the tunnel costing \$54; that from September 6 to 18, 1919, he had work done in cleaning out caves in the 5-foot tunnel mentioned in his former affidavit, in which was exposed a 3½-foot vein of coal; that he continued repairing roads and trails; that he paid \$70 for a further examination and report by a mining engineer on November 18 and 19, 1919. He further alleges that cessation of work on May 27 and September 6, 1919, was caused by an influenza epidemic and the pendency of conflicting applications which went to hearing; that he was seriously ill from January 15 to March 1, 1920, with influenza; that it was impossible to work his claim during the winters of 1918, 1919, and 1920.

After consideration of the matters and facts set up above, it is necessary to determine first whether the protest filed against Frageskakis's application sufficiently asserted any material facts which, if established, would defeat his claim. The allegations of the Wallaces, in their protest filed on June 29, 1922, and those of Hill and McCarty, appearing in their motion filed July 5, 1922, are all made on information and belief, and are not corroborated by any person alleging they have personal knowledge of the facts. They are, therefore, insufficient as a protest and will be disregarded. The statements in the affidavits of Ewing and Farley filed later are confined to a denial of the allegations of Frageskakis as to work and improvements made subsequent to November 4, 1918, the date he alleged he had opened and improved a mine. Even if such allegations are true, they do not controvert the allegations of Frageskakis that he had opened and improved a mine on said date, nor does the denial that certain specified improvements, or any work on improvements, were made by Frageskakis after the alleged date of the opening and improvement of a mine amount to an allegation that Frageskakis was not in actual possession of such mine or mines as required by section 2348. The allegations mentioned, considered as a protest, are therefore insufficient and raise no material issue that would defeat the application of Frageskakis. They are consequently disregarded.

It becomes necessary now to consider the findings of the Commissioner that Frageskakis's application and supplemental showings do not disclose that he opened a sufficient mine of coal and that his declaratory statement was not a timely filing.

The showings of Frageskakis disclosed that he, in October, 1917, exposed two seams of coal, one 6 feet 8 inches, and the other 3½ feet in thickness, by means of tunnels on the land, and made roads to the property; that in June, 1918, he constructed another road, built a reservoir, and ran a pipe line from it to conduct water to his mine; that he bought a mine car, rails, tools, and installed other facilities and equipment needed in mining, and had a number of men, thereafter and until November 2, 1918, working on the property, all of which work is alleged to have amounted to a total cost of \$11,785. The record does not show that he had filed any prior declaratory statement for this land, and there is no warrant for finding that these improvements were not made in apparent good faith and in contemplation of the filing of the declaratory statement that is questioned. The showings referred to sufficiently indicate a definite design looking to the actual production of coal, the excavations were of a substantial character, and there is no question but that the land is coal in character.

The Department is therefore of the opinion that Frageskakis opened and improved a mine of coal on the land applied for; that his showing in that regard meets the test defined in *McKenna v. Seymour* (47 L. D., 395). While the supplemental showings referred to fail to set forth the facts in sufficient detail to enable the Department to determine definitely at what stage of the operations, or on what date the mine or mines should be considered opened and the improvements commenced on such mine or mines, yet it is evident that the mere exposure of coal in conjunction with the installation of other mining facilities on the land does not necessarily constitute the opening of a mine of coal and the commencement of improvements in the contemplation of the coal land laws. Frageskakis states he opened such mine on November 4, 1918, and it has not been found that his other additional statements are inconsistent with such declaration. In the absence, therefore, of a sufficiently supported allegation to the contrary, such date will be taken as the date upon which his preference rights accrued. The contention of the adverse claimants that the time should run from the date of his declared first possession of the land is not in harmony with the construction placed upon the pertinent prescriptions of section 2349 of the Revised Statutes:

Section 2349, Revised Statutes, in connection with the preceding section, contemplates that the coal declaratory statement or notice setting up a preference-right claim must be presented within sixty days after the date of the inception of the preference right, that is to say, within sixty days after the date a mine of coal has been opened and improvements on such mine commenced, accompanied by actual possession of the land. (*J. T. Williams and John Blathran*, 48 L. D., 176, 178.)

The record shows that Frageskakis failed to file his declaratory statement within sixty days from the accrual of his right. There was not at the date of such filing any intervening adverse right asserted, and no other disposition of the land had been made, and his subsequent presentation of such declaratory statement within the ensuing year afforded him the same security had he filed it in time, but not beyond the period which he would have enjoyed had he filed it within the prescribed time. Charles S. Morrison (36 L. D., 319). As Frageskakis filed his application to purchase within one year of the date his preference right accrued, it is clear that such application was filed in time.

The application by Pilati to make homestead entry was fundamentally defective, in that he had neither submitted requisite and proper evidence to establish that he was a naturalized citizen, as alleged in his application, nor submitted proper evidence of his intention to become a citizen. Hence, he had not shown that he was entitled to a preference right of entry. The acts of Frageskakis in taking and maintaining possession of the land and opening a mine of coal thereon and the acts of the local officers in accepting his application, permitting publication and proof, requiring payment of purchase price constituted an appropriation of the land, duly recognized and noted of record. The subsequent allowance then of the homestead entry was erroneous and irregular, not only because the basic qualifications to make entry had not been shown but because at the date of such entry the land was appropriated by Frageskakis's filings. The later cancellation of the homestead entry rendered the land free from surface conflict.

In accordance with the views above expressed, it is held that Frageskakis having opened and improved a mine of coal on the land and having exercised his preference right to acquire the same prior to the intervention of any adverse rights, he is entitled to purchase not only the coal, but the land he has applied for. Under the practice prevailing heretofore, the Commissioner permitted Frageskakis an extension of time to pay the purchase money. His failure to tender the money is excused under the facts disclosed by the record, but such facts afford no ground for any further extension. He will accordingly be required to pay the purchase money within thirty days from notice of this decision, and if such payment is made the applications 024670 and 025298 will be rejected to the extent of their conflict with Frageskakis's application. If, however, he shall fail to timely make such payment, his application will be rejected and the SW.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , Sec. 18, will become subject to disposition under the application 024670, and the E.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , Sec. 18, under application 025298, in the manner hereinafter directed.

Applications 024670 and 025298 are not in conflict with each other, and the work and improvements alleged by the applicants are not claimed to be located on the tracts embraced in Frageskakis's claim. The substantial defects in their showings have been cured.

The Department believes, as to each of said applications, that a sufficient showing has been made, disclosing that a mine of coal has been opened upon the lands claimed, in such applications, to establish a preference right existing prior to February 25, 1920.

Applicants under applications 024670 and 025298 will, therefore, be allowed to purchase the *land* in such of the tracts embraced in their respective applications as are free from prior, valid surface claims excluding the tracts for which Frageskakis may and shall pay for as hereinbefore required. They may also purchase the coal deposits on such of the tracts embraced in their applications as may be subject to prior, valid surface rights.

The application to designate the SE.  $\frac{1}{4}$  NE  $\frac{1}{4}$ , Sec. 18, as a leasing unit must be rejected as Frageskakis has a prior right to purchase said coal deposits.

The decision of the Commissioner is accordingly reversed and the case is remanded for appropriate procedure in harmony with these views.

#### J. D. MELL ET AL.

*Decided March 12, 1924.*

#### ~~OIL AND GAS LANDS—PROSPECTING PERMIT—RESERVATION.~~

An oil and gas prospecting permit will be denied under section 13 of the act of February 25, 1920, for lands dedicated to some special public purpose, such as a bird reservation, if drilling operations will jeopardize or impair the use of the land for the special purpose to which it was dedicated.

#### ~~RECLAMATION—OIL AND GAS LANDS—PROSPECTING PERMIT—LEASE.~~

Lands acquired by purchase or condemnation pursuant to section 7 of the reclamation act, when no longer needed for reclamation purposes, can be disposed of only at public auction and the proceeds derived therefrom must be placed in the reclamation fund to the credit of the particular project; such lands and the oil and gas deposits therein are not subject to prospecting or lease under the act of February 25, 1920.

#### ~~RECLAMATION—WITHDRAWAL—IMPROVEMENTS—OIL AND GAS LANDS.~~

Public lands, withdrawn for a reservoir site, which can not be restored to the public domain without damage to the project, or which have, because of improvements placed thereon, become lands that may be sold only for the benefit of the reclamation fund, are not subject to the operation of the leasing act of February 25, 1920.

#### ~~RECLAMATION—WITHDRAWAL—RESTORATIONS—IMPROVEMENTS—OIL AND GAS LANDS.~~

Public lands withdrawn for a reservoir site, or other similar purpose, which contain deposits of oil or gas, may be restored and leased pursuant to the

act of February 25, 1920, where their restoration can be affected without damage to the project, or unless, because of improvements placed thereon, the lands have become subject to disposition only by sale for the benefit of the reclamation fund.

RECLAMATION—WITHDRAWAL—RESTORATIONS—INDEMNITY—OIL AND GAS LANDS—PROSPECTING PERMIT—NEW MEXICO.

Lands reconveyed to the United States by the State of New Mexico for reclamation purposes pursuant to the enabling act of June 20, 1910, which contains an indemnity provision as consideration for such transfers, occupy a status similar to that of withdrawn public lands, rather than that of lands acquired by purchase or condemnation, and the granting of permits to prospect for oil or gas upon such lands will be dependent upon the determination of whether or not their restoration will be detrimental to the project.

RECLAMATION—WITHDRAWAL—MINERAL LANDS—LEASE.

Lands withdrawn for a reservoir site or similar reclamation purposes which are essential to the project, and lands acquired by purchase or condemnation for the exclusive use of the project, may be developed for their mineral resources only by temporary leases for periods not inconsistent with the needs of the project, and the proceeds therefrom must be placed in the reclamation fund to the credit of that project.

DEPARTMENTAL DECISION CITED AND APPLIED.

Case of Martin Wolfe (49 L. D., 625), cited and applied.

FINNEY, *First Assistant Secretary*:

This is an appeal by J. D. Mell, Lelia Atwood, and Rex M. Williams from the decision of the Commissioner of the General Land Office, dated July 24, 1923, which rejected their application for an oil or gas prospecting permit, filed pursuant to the act of February 25, 1920 (41 Stat., 437), as to certain lands in the Roswell, New Mexico, land district.

The SW.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , Sec. 30, W.  $\frac{1}{2}$  NW.  $\frac{1}{4}$ , Sec. 31, T. 18 S., R. 27 E., the SW.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , E.  $\frac{1}{2}$  SW.  $\frac{1}{4}$ , NW.  $\frac{1}{4}$ , W.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , Sec. 6, all Sec. 7, T. 19 S., R. 27 E., and the E.  $\frac{1}{2}$  SE.  $\frac{1}{4}$ , Sec. 1, T. 19 S., R. 26 E., N. M. P. M., were withdrawn by Executive order of February 25, 1908, for the Carlsbad Bird Reserve; and, upon a report from the Bureau of Biological Survey that prospecting operations within the reserve would defeat its purpose by causing the birds to desert that area, the Commissioner rejected appellants' application.

It further appears that lot 4, Sec. 30, lots 2, 3, 4, SE.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , Sec. 31, T. 18 S., R. 27 E., lots 1 and 2, SE.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ , Sec. 1, E.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , Sec. 12, T. 19 S., R. 26 E., lots 3 and 4, Sec. 6, T. 19 S., R. 27 E., were patented to entrymen under the homestead laws, but have since been acquired by the United States by condemnation proceedings, in accordance with section 7 of the act of June 17, 1902 (32 Stat., 388), for use in the enlargement of the McMillan reservoir in the Carlsbad reclamation project.

*as to what are "public lands" see*

258 U.S. 574

159 U.S. 64 121:284-587

In the decision appealed from, the Commissioner concurred in the view stated by the Director of the Reclamation Service, in his report of March 5, 1921, that lands acquired from private ownership for use in the reclamation project were not subject to permit or lease under the act of February 25, 1920, *supra*, but should be leased for the exclusive benefit of the reclamation fund; and appellants' application was rejected as to these lands.

A similar view was taken with respect to Sec. 36, T. 18 S., R. 26 E., which was granted to the State of New Mexico as a school section, and was reconveyed to the United States on May 21, 1917, pursuant to paragraph 5 of section 28 of the enabling act of June 20, 1910 (36 Stat., 557), for reclamation purposes.

The Department concurs in the action of the Commissioner in rejecting appellants' application as to the land in the bird reserve. That action was in conformity with the views expressed in the case of Martin Wolfe (49 L. D., 625), as to the granting of prospecting permits for lands dedicated to some special public purpose, where drilling operations would jeopardize or impair the use of the land for the special purpose to which it was dedicated.

There remains the question whether lands acquired by purchase or condemnation proceedings, under section 7 of the reclamation act of June 17, 1902, *supra*, and lands reconveyed by the State of New Mexico, as provided in its enabling act, are subject to prospecting operations and to lease as provided in the leasing act of February 25, 1920 (41 Stat., 437).

The question as to the authority of the Secretary to lease lands acquired by purchase or condemnation proceedings for use in carrying out the provisions of the reclamation act, has been considered by the Department on various occasions.

In an opinion by the Assistant Attorney General, dated March 10, 1906 (34 L. D., 480), it was pointed out that lands so acquired are not, in many instances, immediately required in the construction of reservoirs or other uses of the particular project for which they were acquired; and it was held that while such lands are "lands belonging to the United States," they are not public lands within the technical meaning of that term, and are not controlled by the laws governing the disposition of public lands, but that they nevertheless may be "temporarily leased by executive authority for other uses, where such use and occupancy will not interfere with the use of the property for the purposes contemplated by its acquisition, whenever it is needed for that purpose."

The question whether prospecting for oil could be permitted upon certain lands withdrawn for reclamation purposes in connection with the Sun River Project in Montana was considered the same year. In Instructions of October 6, 1906 (35 L. D., 216), this matter was

fully discussed. While it does not appear that the land therein involved was acquired pursuant to section 7 of the act of June 17, 1902, *supra*, nevertheless the question of the right to acquire and use mineral lands in connection with a reclamation project was considered. It was stated therein—

There can be no question as to the authority of the Secretary of the Interior to purchase for such use private property, although it may contain valuable deposits of mineral. The power to appropriate public lands of such character for similar uses is surely coextensive with the power to purchase private property of that character.

It follows from this that the right to appropriate public land for use in the construction and operation of irrigation works is not affected by the fact that the land is mineral in character, although such fact must necessarily enter into consideration in determining whether a project is practicable or feasible.

The object contemplated by the construction of works under the reclamation act is not of such great public interest and concern as to demand that important mining interests of great value be jeopardized or destroyed by the use of lands containing mineral deposits of great value, and the question as to the comparative value of the land for the uses to which it may be applied will always be considered whenever it may arise.

The Department then held that lands withdrawn for reservoir purposes might be prospected for oil and gas, without any special permit, and reserved decision as to what disposition would be made of the land, if oil was discovered, until that event occurred, intimating that if the paramount value of the land was for mining purposes the withdrawal would be revoked. This was before the passage of the leasing act; and under the laws then in force the mining claimants would, if the land was restored upon discovery, have been entitled to a patent, pursuant to the placer mining laws. In the recent case of Martin Wolfe, *supra*, the Department declined to issue a prospecting permit for lands reported by the Reclamation Service as within one quarter mile of, or below, the flow line of the Nelson reservoir of the Milk River project in Montana, where it appeared that prospecting operations would constitute a definite menace to the water supply of the project.

Regulations governing the leasing of lands set aside for reservoir sites for agricultural or grazing purposes have been issued by the Department on various occasions. See Instructions of February 28, 1911 (39 L. D., 525), and departmental regulations approved May 7, 1917 (46 L. D., 108). These leases, however, are for short periods, and are made with due regard for the paramount dedication of the land to use in connection with the reclamation project, and as a measure of economy designed to aid said project through the enhancing of the reclamation fund, as the rentals received are paid into said fund.

While there has been no distinction made between public lands withdrawn for reservoir purposes and private lands acquired by purchase or condemnation for the same purpose, as regards leases for grazing and agricultural purposes, the Department is of the opinion that a distinction must be made as to the issuance of prospecting permits and leases under the leasing act of February 25, 1920, *supra*.

In section 13 of that act the Secretary of the Interior is authorized to issue permits to prospect for oil and gas upon "lands wherein such deposits belong to the United States and are not within any known geologic structure of a producing oil or gas field." The act specifies that the permittee shall have the exclusive right to prospect for oil and gas upon such lands for the period of two years. By the act of January 11, 1922 (42 Stat., 356), the Secretary may extend the life of the permit for not to exceed three years, upon a satisfactory showing of diligence by the permittee.

Upon the discovery of oil a permittee is entitled, pursuant to section 14 of the act, to a lease for one-fourth of the land described in his permit. The act provides that "such leases shall be for a term of twenty years," with a right of renewal for successive periods of ten years each, and the permittee is given a preference right to a lease of any or all of the remaining lands described in said permit upon similar terms. In addition to the royalties specified by said act, provision is made for the annual payment of a rental of \$1 per acre per year, to be paid in advance by the lessee.

The following provision is made as to the proceeds from said leases (section 35):

That 10 per centum of all money received from sales, bonuses, royalties, and rentals under the provisions of this act, excepting those from Alaska, shall be paid into the Treasury of the United States and credited to miscellaneous receipts; for past production 70 per centum, and for future production 52½ per centum of the amounts derived from such bonuses, royalties, and rentals shall be paid into, reserved, and appropriated as a part of the reclamation fund created by the act of Congress, known as the reclamation act, approved June 17, 1902, and for past production 20 per centum, and for future production 37½ per centum of the amounts derived from such bonuses, royalties, and rentals shall be paid by the Secretary of the Treasury after the expiration of each fiscal year to the State within the boundaries of which the leased lands or deposits are or were located, said moneys to be used by such State or subdivisions thereof for the construction and maintenance of public roads or for the support of public schools or other public educational institutions, as the legislature of the State may direct.

When the difference in the means of acquisition of lands in first form reclamation withdrawals, and by purchase or condemnation for reclamation purposes, is considered together with the provisions of the reclamation laws as to revenue and proceeds derived from said

lands, the distinction as to leasing under the act of February 25, 1920, *supra*, is apparent.

In the case of a withdrawal, public lands are set aside by the Secretary for use in connection with the irrigation works of the project, with a knowledge that title to said lands will ultimately pass to the water-users' association, as provided in the act of June 17, 1902, *supra*. Lands so withdrawn may be restored to the public domain when it appears that they are not essential to the project; but in cases where valuable improvements have been placed upon the land, at the expense of the reclamation fund, the Secretary must cause the land to be appraised and sold at public auction, as provided in the act of May 20, 1920 (41 Stat., 605). The moneys derived from such sale must be covered into the reclamation fund and placed to the credit of the project for which such lands were withdrawn.

As to withdrawn lands which have not been improved at the expense of the project, and which could, upon discovery of oil or gas, be eliminated from the project without injury thereto, it is clear that a prospecting permit may properly be issued pursuant to the act of February 25, 1920, *supra*.

Applications for prospecting permits must be denied, however, where the withdrawn land can not be eliminated without damage to the project, in the event of discovery of oil or gas, and where, because of improvements placed upon the land, its sale is required for the reimbursement of the reclamation fund rather than restoration to the public domain for lease under the act of February 25, 1920, for in that event the proceeds would only in part be paid into the reclamation fund.

In the case of private lands acquired by purchase or condemnation, said lands are from the outset definitely segregated from the public domain. The cost of their acquisition must be paid from the reclamation fund, and the lands, when no longer needed for the project, can not be opened to entry under the public land laws but must be sold at public auction, after appraisal, and the moneys received therefor must be paid into the reclamation fund and credited to the project for which it was purchased. See act of February 2, 1911 (36 Stat., 895).

As to such lands it is clear that the granting of a permit to prospect for oil or gas must be denied, as the permittee, if permit should be granted and oil or gas discovered, would be entitled to a lease with rights of renewal which would indefinitely withhold the land from use in the project, in most cases. Were the oil development not inconsistent with the purposes to which the land is dedicated under the project, nevertheless the proceeds from said land would,

by virtue of the provisions of the leasing act, be applied in a manner inconsistent with the declared policy of Congress with respect to such lands, namely, that all the proceeds from lands so purchased should be covered into the reclamation fund, as expressed in the acts of June 17, 1902, *supra*, of March 3, 1905 (33 Stat., 1032), and of February 2, 1911, *supra*.

The land reconveyed by the State of New Mexico appears to occupy a status similar to withdrawn public lands, as the provision with respect thereto in the enabling act of June 20, 1910, is as follows:

That said State, at the request of the Secretary of the Interior, shall from time to time relinquish such of its lands to the United States as at any time are needed for irrigation works in connection with any such government project. And other lands in lieu thereof are hereby granted to said State, to be selected from lands of the character named and in the manner prescribed in section twenty-four of this act.

There is in such case an indemnity grant of public land as consideration for such transfers. This does not constitute a special charge against the reclamation fund which requires that the land be disposed of so as to reimburse said fund, nor is there any reason why the land so acquired may not, in proper cases, be restored to the public domain. Applications for prospecting permits for lands acquired pursuant to said act will be granted or rejected under the same conditions as herein stated with respect to public lands withdrawn under the first form.

Section 37 of the leasing act provides in part—

That the deposits of coal, phosphate, sodium, oil, oil shale, and gas, herein referred to, in lands valuable for such minerals. \* \* \* shall be subject to disposition only in the form and manner provided in this act.

This provision is limited to "deposits \* \* \* herein referred to," and the Department is of the opinion that lands acquired by purchase or condemnation pursuant to section 7 of the reclamation act, *supra*, and oil and gas deposits therein, are not within the purview of the leasing act; and that such lands may be temporarily leased by the Secretary, under such conditions as he may prescribe, under the same authority and circumstances as have been held to warrant leases of such lands for agricultural and grazing purposes, that is, so long as such use is subservient to, and in harmony with, the most economical and efficient use of the land for the purpose for which it was acquired. The power to make such leases flows from the general supervisory powers given by the reclamation act and can not be exercised as to matters beyond its scope.

The same power to make temporary leases exists and may be exercised as to lands which are withdrawn for a reservoir site or other similar purpose, and may not be restored to the public domain

for development under the act of February 25, 1920, *supra*, without damage to the project, or which have, because of improvements placed thereon, become lands which may only be sold for the benefit of the reclamation fund.

The report from the Reclamation Service does not contain sufficient data to enable the Department to determine whether a permit may properly issue as to the land transferred by the State, and a supplemental report will be necessary as to that land.

The decision of the Commissioner as to the land in the bird reserve and the land purchased under section 7 of the reclamation act was correct and is affirmed. His decision is modified as to the land acquired from the State, and the application remanded for further consideration in accordance with the views herein expressed.

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**J. D. MELL ET AL.**

Motion for rehearing of departmental decision of March 12, 1924 (50 L. D., 308), denied by First Assistant Secretary Finney, May 21, 1924.

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**STATUS OF THE NATIVES OF ALASKA WITH RESPECT TO THE  
TITLE TO CERTAIN TIDE LANDS NEAR KETCHIKAN.**

*Opinion, March 12, 1924.*

**ALASKA—INDIAN LANDS—OCCUPANCY—STATUS OF NATIVES.**

The status of the Indians and other "natives" of Alaska is similar to that of the American Indians within the territorial limits of the United States, and the extent of their interests in the public lands therein is merely that of use and occupancy, subject to such further grant of title as Congress from time to time may see fit to accord.

**ALASKA—INDIAN LANDS—RESERVATION.**

A reservation created by the Secretary of the Interior pursuant to section 10 of the act of May 14, 1898, setting apart a particular area of public land in Alaska for the benefit of the Indians or natives does not vest them with actual title.

**ALASKA—INDIAN LANDS—TIDE LANDS—OCCUPANCY—RESERVATION—JURISDICTION.**

The tide or other lands in Alaska, occupied or reserved for the Indians or natives, can not be disposed of by them under existing law, but the power rests with Congress, with or without their consent, to provide for the ultimate disposal of these lands.

**EDWARDS, Solicitor:**

There has been submitted for my opinion a question presented by William L. Paul, an attorney at law, of Ketchikan, Alaska, involving the title to certain tidelands near the town of Ketchikan.

Claiming to be a native Alaskan, a descendant of the Tongass Tribe, with a power of attorney from the entire tribe, Mr. Paul asserts with some confidence that the United States is without power to deprive the natives of Alaska of any of their holdings without their consent. These circumstances suggest a more extended discussion of the situation than ordinarily would be required.

The domain embraced in the Territory of Alaska was acquired from Russia in 1867, by treaty dated March 30 of that year (15 Stat., 539). With reference to the rights of individuals in the territory so ceded, Article III of that treaty provides:

The inhabitants of the ceded territory, according to their choice, reserving their natural allegiance, may return to Russia within three years; but if they should prefer to remain in the ceded territory, they, with the exception of uncivilized native tribes, shall be admitted to the enjoyment of all the rights, advantages and immunities of citizens of the United States, and shall be maintained and protected in the free enjoyment of their liberty, property and religion. The uncivilized tribes will be subject to such laws and regulations as the United States may, from time to time, adopt in regard to aboriginal tribes of that country.

The act of May 17, 1884 (23 Stat., 24), which virtually constitutes the organic act for the Territory of Alaska, expressly declares in section 8—

That the Indians or other persons in said district shall not be disturbed in the *possession* of any lands actually in their use or occupation or now claimed by them but the terms under which such persons may acquire *title* to such lands is reserved for future legislation by Congress. [Italics supplied.]

Section 11, *et seq.*, of the act of March 3, 1891 (26 Stat., 1095, 1099), authorizing the establishment of town sites in Alaska, the acquisition by individuals of limited areas for trade or manufacturing purposes, etc., expressly excepts, in section 14, "any lands \* \* \* to which the natives of Alaska have prior rights by virtue of actual occupation." Section 15 of the latter act also reserved for use of the Metlakahla Indians the body of lands known as "Annette Islands," but with these we are not here directly concerned other than to observe that it has since been held that the reservation so created extends to and includes adjacent "deep waters." See *Alaska Pacific Fisheries v. United States* (248 U. S., 77).

The foregoing abundantly illustrates the fact that the Indians and other "natives" of Alaska are in the same category as the other Indians of the United States. I have so held in a recent opinion dated May 18, 1923. See 49 L. D., 592. In other words, whether in Alaska or elsewhere in the territorial domain of the United States, the right of the aborigines, Indians or otherwise, is simply that of use and occupancy subject to such further grant of title as Congress from time to time may see fit to accord. The proviso to section 8 of the act of May 17, 1884, reproduced above, clearly shows this in so

far as the Indians of Alaska are concerned. From an early date, pursuant to the legislative intent indicated by Congress, this Department has consistently recognized and respected the rights of the natives of Alaska in and to the lands occupied by them. See 13 L. D., 120; 23 L. D., 335; 24 L. D., 312; 26 L. D., 517; 28 L. D., 427; 37 L. D., 334.

So much for the situation generally. With respect to the tidelands immediately here in question it may be said by the act of May 14, 1898 (36 Stat., 409), the homestead laws of the United States were extended to the Territory of Alaska, and by section 10 of that act the Secretary of the Interior was authorized to reserve for use of the natives of Alaska "suitable tracts along the water front of any stream, inlet, bay or seashore, for landing places for canoes and other craft used by such natives." On August 5, 1905, pursuant to the authority just referred to, the Acting Secretary of the Interior reserved the lands described as—

All the lands in the vicinity of the mouth of Ketchikan Creek which lie between the lands occupied by the natives and the limits of low tide of Tongass Narrows.

Subsequently the town site of Ketchikan was established, pursuant to section 11 of the act of March 3, 1891, *supra*, surveyed into lots, blocks, streets, and alleys and the lots therein, or the most of them at least, disposed of to private individuals. This town is now an incorporated municipality, as the act of February 7, 1920 (41 Stat., 402), will show, but the reserve of the tidelands along Tongass Narrows heretofore established as a landing place for the benefit of the natives has never been vacated.

In prior communications to this Department, Mr. Paul stated that the natives are tired of their present location in Ketchikan and for various reasons desire to move to some other locality near by. With this in view, Mr. Paul inquired if the natives would be permitted to sell their holdings; and by departmental letters of October 2 and December 1, 1923, he was advised that there is no authority under existing law by which these lands can be sold. It was further pointed out that by section 2 of the act of May 17, 1898, Congress had declared an intent to hold the tidelands and the beds of navigable streams in Alaska in trust for the people of the future State, or States, to be created out of that Territory, and that in the absence of additional legislation by Congress this Department was without authority to make any other disposal thereof. I see no occasion here to question the soundness of that view. As previously shown, until Congress grants some greater title, the right of the natives in Alaska is simply one of use and occupancy. Nor does the reservation of a particular area for their benefit result in placing

actual title in the Indians. This is clearly shown by the ruling of the Supreme Court in the Alaska Pacific Fisheries case, *supra*, involving the reserve for the Metlakahtla Indians, wherein the court said, page 88:

The reservation was not in the nature of a private grant, but simply a setting apart, "until otherwise provided by law," of designated public property for a recognized public purpose—that of safeguarding and advancing a dependent Indian people dwelling within the United States.

Prior to the admission of a new State Congress has the power, of course, by grant or otherwise, to dispose of lands underlying navigable waters, tide or inland, in any of the territorial domain of the United States. *Shively v. Bowlby* (152 U. S., 1). In the absence of specific legislation by that body, however, title to such lands can not be acquired by any individual or group of individuals, Indian or otherwise. *Mann v. Tacoma Land Company* (153 U. S., 273) and *Alaska Pacific Fisheries v. United States*, *supra*. So also, about the plenary power of Congress over tribal Indian property there can be no doubt, and in the absence of an express grant the power so resting in Congress extends even to the abrogation, by statute, of the provisions of a prior treaty. See *Lone Wolf v. Hitchcock* (187 U. S. 553, 565), and cases there cited.

I am of the opinion that the tide or other lands occupied by or reserved for the Indians at Ketchikan, Alaska, can not be disposed of under existing law but that the power rests with Congress, by statute, with or without the consent of the Indians, to provide for the ultimate disposal of those lands.

Approved:

F. M. GOODWIN,

*Assistant Secretary.*

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ARTHUR WALSH.

*Decided March 12, 1924.*

COAL LANDS—PROSPECTING PERMIT—AMENDMENT—LACHES.

Rights acquired by the filing of a coal prospecting permit application, prior in time, which the local officers suspended for further showing on the part of the applicant, are not defeated by the filing of an application by another where the defect was afterwards cured by an amendatory application and the first applicant was not chargeable with laches.

DEPARTMENTAL DECISION CITED AND APPLIED.

Case of Harvey V. Craig (50 L. D., 202), cited and applied.

GOODWIN, *Assistant Secretary*:

Arthur Walsh has appealed from the decision of the Commissioner of the General Land Office rejecting his application for coal-pros-

pecting permit covering the SW.  $\frac{1}{4}$ , Sec. 24, T. 16 N., R. 56 E., M. P. M., Miles City, Montana, land district.

Walsh filed an application for coal-prospecting permit covering the above-described land on June 7, 1923. On June 23, 1923, the local officers issued a notice to Walsh to furnish an affidavit "stating any interest you may have in other permits or leases." No evidence of service of this notice is shown. On August 30, 1923, the local officers notified Walsh that no action had been taken in response to the requirement, and held the application for rejection, but allowed him 30 days to comply or withdraw his application.

On September 4, 1923, Frank W. Young filed a like application covering the W.  $\frac{1}{4}$  of said Sec. 24. On September 11, 1923, Walsh filed another application, sufficient in form and substance, for coal-prospecting permit, stating he had no interest in any other coal-prospecting permit, but describing the land applied for as the SE.  $\frac{1}{4}$  of said Sec. 24.

On October 1, 1923, the Commissioner held Walsh's application for rejection and allowed him 30 days from notice to furnish a correct description of the land actually sought by him. Service of this requirement was made October 13, 1923. On November 7, 1923, Walsh filed an amendment to his application requesting that the SW.  $\frac{1}{4}$  be substituted for the SE.  $\frac{1}{4}$  of said Sec. 24. On November 20, 1923, the Commissioner held that Young's application was a prior filing and rejected Walsh's application, stating as grounds therefor—

In the absence of intervening adverse claims, the amended application filed by Walsh would revert to the date of the original filing, namely, June 7, 1923. In this case, there being an intervening adverse claim, namely the application filed by Young, any rights accruing to Walsh would attach from the date of his amended application, namely, November 7, 1923.

Walsh alleged in his appeal that the insertion of the SE.  $\frac{1}{4}$  instead of the SW.  $\frac{1}{4}$  in his second application was a mistake of the scrivener.

The authority to consider and determine the merits and validity of applications for prospecting permits, in the first instance, resides with the Commissioner of the General Land Office; the functions of the local officers in this connection are of ministerial nature only. See departmental decision of November 24, 1923, in the case of Harvey V. Craig (50 L. D. 202). At the time Young filed his application, there was pending the suspended, though defective, application of Walsh for the SW.  $\frac{1}{4}$  of said Sec. 24. The record does not show that Walsh is chargeable with any laches in remedying the defect. His second application was in fact amendatory of the first, and his rights should not be defeated by a mere clerical error in his description of the land occurring after Young filed his application. The latter was in nowise misled thereby.

The application of Walsh should be treated as having been initiated June 6, 1923. It is prior in time to that of Young. Upon furnishing the required bond the application of Walsh should be allowed and that of Young rejected. Error being patent on the face of the record it is unnecessary to consider matters *dehors* urged in the appeal. Accordingly the Commissioner's decision is reversed and the case remanded for appropriate procedure and in accordance with the views above expressed.

**COAL LAND REGULATIONS—PARAGRAPH 8, CIRCULAR NO. 679, AS AMENDED BY CIRCULAR NO. 809, FURTHER AMENDED—PARAGRAPH 22, CIRCULAR NO. 679, AMENDED.**

[Circular No. 922.]

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., March 13, 1924.

REGISTERS AND RECEIVERS,

UNITED STATES LAND OFFICES:

Paragraph 8 of the regulations of April 1, 1920, Circular No. 679 (47 L. D., 489), governing coal mining leases, permits, and licenses under the act of February 25, 1920 (41 Stat., 437), which paragraph was amended February 15, 1922, Circular No. 809 (48 L. D., 439), is hereby amended to read as follows:

8. *Minimum development.*—An actual *bona fide* expenditure for mine operation, development, or improvement purposes of the amount determined by the Secretary and stated in the lease offer hereinafter referred to, is adopted as the minimum basis for granting leases, with the requirement that not less than one-third of the required investment shall be expended in development of the mine during the first year, and a like amount each year for the two succeeding years, the investment during any one year over such proportionate amount for that year to be credited on the expenditure required for the ensuing year or years. If the investment to be made is fixed at more than \$10,000, the lessee shall furnish a bond, with approved corporate surety or with two qualified individual sureties, conditioned upon the expenditure of the specified amount of investment. After the required investment has been made, a bond in the sum of \$5,000, with approved corporate surety, conditioned upon compliance with the terms of the lease, will be required. In case of lease of a small area, where the investment to be made is \$10,000 or less, the lessee shall furnish a bond, with approved corporate surety or with two qualified individual sureties, to cover both the investment and compliance with the terms of the lease, such bond to be in half the amount of the investment to be made, but in no case less than \$1,000. With bonds signed by individual sureties must be filed affidavits of justification by the sureties that each is worth double the sum specified in the undertaking over and above his just debts and liabilities in real property exempt from execution, and a certificate by a judge or clerk

of a court of record; a United States district attorney, a United States commissioner, or a United States postmaster, as to the identity, signatures and financial competency of the sureties. All bonds will be examined from time to time as to their sufficiency, and additional security will be required whenever deemed necessary.

Paragraph 22 of said regulations is hereby amended by adding an additional paragraph, as follows:

(g) After a permit is ready for delivery, the permittee will be notified and allowed thirty days within which to furnish a bond, with approved corporate surety or two qualified individual sureties (with evidence of qualification as provided in paragraph 8), in the sum fixed by the Secretary when the permit is granted, but not to exceed \$500, conditioned upon compliance with the terms of the permit and against failure of the permittee to use reasonable precautions to prevent damage to the coal deposits or to leave the premises in a safe condition upon the termination of the permit. Bond with additional obligations therein will be required where the permit embraces lands entered or patented with the coal reserved under the act of June 22, 1910 (36 Stat., 583), or where the lands are a portion of a reclamation project.

WILLIAM SPRY,  
*Commissioner.*

Approved:

E. C. FINNEY,  
*First Assistant Secretary.*

### WATSON v. MOORE, ASSIGNEE OF WATSON.

*Decided March 20, 1924.*

LAND DEPARTMENT—COURTS—PUBLIC LANDS—PATENT—JURISDICTION—HOMESTEAD ENTRY.

Prior to the issuance of patent, title to public lands under any of the homestead laws remains in the United States to be administered by the Land Department, and until then State courts are without jurisdiction to vest or divest title under any of those laws.

DEPARTMENTAL DECISION CITED AND APPLIED.

Case of *Julia E. Ward et al.* (41 L. D., 634), cited and applied.

GOODWIN, *Assistant Secretary*:

The record in this case discloses that the final homestead proof submitted by Robert T. Watson on his homestead entry, 01892, for farm unit "C," Minidoka project, or the NE.  $\frac{1}{4}$  NW.  $\frac{1}{4}$  Sec. 12, T. 9 S., R. 24 E., B. M., containing 40 acres, Hailey land district, Idaho, was accepted July 29, 1911, as to residence, cultivation, and improvements, subject to the requirements of the reclamation act of June 17, 1902 (32 Stat., 388).

It appears that on February 8, 1912, Watson made an assignment of said entry to Walter L. Moore under the act of June 23, 1910

(36 Stat., 592), which provides in substance that homestead entries within reclamation projects may be assigned and patent issued to the assignee upon submission of proof and payment of charges apportioned against the same, such assignment to be subject to the limitations, charges, terms, and conditions of the reclamation act.

The assignment to Moore was made by quitclaim deed, dated December 8, 1911, duly acknowledged by the entryman and supported by the assignee's affidavit and the certificate of the project manager. Said quitclaim deed, however, does not bear the signature of Mary A. Watson, wife of the entryman. The assignment is otherwise in proper form and in accordance with the regulations in effect at that time. Final reclamation affidavit has never been submitted, and patent can not issue until such affidavit is submitted, approved by the project manager, showing reclamation as provided by the act and regulations thereunder, and payment of all fees, commissions and water charges to the date of submission of same.

The record further discloses that a decree was rendered by the eleventh judicial circuit court of the State of Idaho, county of Minidoka, in the case of Mary L. Watson *v.* Walter L. Moore, upon complaint of Watson and answer and cross complaint of Moore, wherein it was ordered and adjudged that said Mary A. Watson is the owner in fee simple of the described land, and said Walter L. Moore and all persons claiming under him were forever barred from any and all claim of right or title to said premises or lien thereon or any part thereof.

By decision dated July 20, 1923, the Commissioner of the General Land Office held that the decree of an Idaho court purporting to divest Walter L. Moore of the title to homestead entry, Hailey 01892, and vest same in Mary A. Watson, could not be recognized, and that said entry must remain of record in the Land Department in the name of Walter L. Moore.

From this action Watson has appealed to the Department. The issues involved have had careful attention and consideration. It is settled law that until patent issues, title to public lands under any of the homestead laws remains in the United States to be administered by the Land Department. The State courts are accordingly without jurisdiction to vest or divest title until the homestead laws have been fully complied with, and title passes from the United States to the entryman or his assigns.

See case of Julia E. Ward *et al.* (41 L. D., 634), and cases there cited.

The decision appealed from is correct and is affirmed.

**AUTHORIZATION FOR EXPENDITURE—PARAGRAPH 282, CIRCULAR NO. 616, AMENDED.**

[Circular No. 923.]

DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE,  
*Washington, D. C., March 22, 1924.*

CHIEFS OF FIELD DIVISIONS,  
HEARINGS OFFICERS, HEARINGS CLERKS,  
AND SPECIAL DISBURSING AGENTS:

Effective April 1, 1924, paragraph 282, Circular No. 616 (46 L. D., 513, 581), is hereby amended to read as follows:

282. *Authorization for expenditure.*—At least two weeks before the beginning of each quarter chiefs of field divisions will submit quarterly estimates in triplicate on Form 4-638a and allotments will be made by the approval and return of a copy of the estimate. Schedules of hearings (Form 4-638) will still be required, but the amount column will be left blank. Supplemental estimates may be submitted when necessary, but they must be plainly marked "Supplemental" and should be avoided whenever possible, and any excess of allotments over the amount needed to the close of a fiscal year must be promptly reported so that the amount may be released for allotment to other divisions. Disbursing officers are not authorized to pay any hearings voucher unless it bears the initials, in the blank space under the certifying officer's certificate, of the chief of field division or of an employee designated by him as hearings clerk, and the placing of such initials on a voucher shall be construed as a certificate by the one whose initials are so placed that the amount of the voucher added to all the other vouchers theretofore certified for services of that fiscal year does not exceed the amount allotted to that division for the period.

WILLIAM SPRY,  
*Commissioner.*

Approved:

E. C. FINNEY,  
*First Assistant Secretary.*

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**STATE OF UTAH v. WATSON OIL COMPANY.**

*Decided March 24, 1924.*

OIL AND GAS LANDS—MINERAL LANDS—STATUTES.

In the second proviso to section 21, and in section 37 of the act of February 25, 1920, Congress expressly recognized oil shale to be a mineral deposit that was subject to location and patent under the mining laws.

OIL AND GAS LANDS—MINERAL LANDS—SURVEY—SCHOOL LAND—UTAH.

Lands that were known to be chiefly valuable for their deposits of oil shale at and prior to the acceptance of the Government survey thereof, were known mineral lands at that time and were, therefore, excepted from the grant to the State of Utah for school purposes.

FINNEY, *First Assistant Secretary*:

The State of Utah has appealed from the Commissioner's decision dated November 9, 1923, in which its protest against mineral application 09059 by the Watson Oil Company for the S.  $\frac{1}{2}$ , Sec. 16, T. 11 S., R. 25 E., S. L. M., Vernal, Utah, land district, was dismissed for the reason that the land was known to be mineral in character at and prior to the approval of the survey thereof by the General Land Office.

It appears that the subdivisinal survey of the township was approved and accepted by the Commissioner on February 5, 1906, and that the plat was filed in the local land office on April 16, 1906, the land being returned as mineral. On May 23, 1916, the tract involved, together with other lands, was classified as mineral, valuable as a source of petroleum and nitrogen. On September 14, 1917, eight persons made location of the Earley Nos. 18 and 23 placer mining claims, embracing the SE.  $\frac{1}{4}$  and the SW.  $\frac{1}{4}$ , respectively, of said Sec. 16. Each location certificate recited that the claim was located as an oil shale placer. Early in 1919, these claims, with many other similar locations, were conveyed to the Watson Oil Company, which had been organized shortly prior thereto. On July 1, 1921, the mineral application was filed. The State of Utah presented its protest on August 23, 1921, claiming the land under its school grant, and asserting that it was not known to be mineral land or valuable for mineral at the time the State was admitted, or at the date of the approval of the survey. The company filed an answer; and a hearing was ordered and, after several postponements, was finally set for June 27, 1923. On the day fixed, the State failed to appear, but the company was represented by its attorney, and the testimony of six witnesses was submitted on its behalf.

On July 3, 1923, the local office rendered a decision adverse to the claim of the State, and recommended that the protest be dismissed and that the company be allowed to proceed. The State appealed. The Commissioner, upon a review of the record, found that the testimony showed that deposits of oil shale had been known to exist upon the S.  $\frac{1}{2}$ , Sec. 16, ever since 1895 or 1896; and that the land had no value whatever for agricultural or other purposes except its potential mineral value. The Commissioner stated that oil shale having been recognized by this Department and by Congress as a mineral deposit and a source of petroleum, and demonstrated to be of material economic importance, the land being valuable on that account, and the deposit having been known to exist at the time the rights of the State would have attached, it must be held that title did not pass to the State on February 5, 1906, the date of the approval of the survey. The protest was, accordingly, dismissed.

In the present appeal, the State contends that the Commissioner erred in holding that oil shale in commercial quantities exists in the land or has been known to exist since 1905, and in assuming that oil shale, at that date, had a known or recognized commercial value.

The evidence is definite and clear, and is to the effect that the oil shale formation is exposed upon each of the claims, and has been so exposed for ages. One of the witnesses testified that he was in the vicinity of the land in 1895 or 1896, and saw the oil rock, as it was then called, and that it was known that a fire, if started, would burn on the rock. The witness, at that time, was with Mr. G. H. Eldredge, a Government geologist, who took samples of the oil rock from near the land. The same kind of rock formation that was sampled extends onto each claim. Another witness stated that he had been acquainted with the region since 1903, and had burned some of the oil rock from near the land during that year. In the spring of 1905, he burned some rock that came from a small cut on the ground now included in the Earley No. 18 claim; and the same rock formation extended onto the land now covered by the Earley No. 23 claim. Another witness testified that he saw the land in Sec. 16 in the fall of 1904, and that he was foreman on the construction of a road built across the land during the following winter. Cuts were made which exposed the shale and oil rock, and those exposures were observable from the road. The character of the oil rock, at that time, was well known. Another witness, a civil engineer, was over the land in January, 1906, and saw the exposures, and was informed that it was oil rock that would burn. He later examined the rock and found that it broke with a black fracture, smelling of oil. He had seen oil distilled from the material. The ground has no value for agricultural purposes, and no value for anything except the oil shale.

The evidence establishes that the mineral-bearing formation, consisting of oil rock or oil shale, was observed and known to exist upon this land in 1905 and 1906, and prior thereto. It was on account of said deposit that the land was classified as mineral in 1916. The tracts have been located and applied for as mineral lands, valuable for the deposit of oil shale. With the application for patent is a copy of a report as to retorting tests made in 1918, at an experimental plant. A sample from the Earley No. 18 claim tested 58.41 gallons of oil per ton, or 23.36 per cent; while a sample from the other location returned 8.80 gallons of oil per ton, or about 3 per cent.

In the leasing act of February 25, 1920 (41 Stat., 437), the second proviso to section 21 authorizes any person having a valid claim for oil shale under existing laws on January 1, 1919, to relinquish such claim and take a lease. By section 37, valid claims for oil shale, as well as the other minerals mentioned, which were existent at the

date of the act and thereafter duly maintained, are excepted from the operation of that statute, and may be perfected under the laws under which the claims were initiated. By this legislation, Congress expressly recognized that oil shale was a mineral deposit which could be located and claimed under the mining laws.

This Department, in its instructions of May 10, 1920 (47 L. D., 548), held as follows (syllabus):

Oil shale having been recognized by both the Department and Congress as a mineral deposit and a source of petroleum, and having been demonstrated elsewhere to be a material of economic importance, lands valuable on account thereof must be held to be subject to valid location and appropriation under the placer-mining laws to the same extent and subject to the same provisions and conditions as if valuable on account of oil or gas.

Oil shale has long been known as a mineral deposit, valuable as a source of petroleum. For many years, the mining and distillation of oil shale has been successfully carried on in Scotland, where an extensive industry exists. In view of these circumstances, the Department is unable to accede to the contention on behalf of the State to the effect that this deposit of oil shale can not be regarded as a mineral deposit of known value in 1905 and 1906, and that therefore, the land passed to the State under its school grant.

The judgment of the Commissioner, holding that these tracts were known mineral lands at and prior to February 5, 1906, the date of the acceptance of the survey, and that title did not vest in the State under the school land grant, is found to be correct, and is affirmed.

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### VAN DYKE COPPER COMPANY v. MALOTT.

*Decided March 24, 1924.*

#### SOLDIERS' ADDITIONAL—FEES—VESTED RIGHT—MINERAL LANDS—HEARING.

Until all fees and commissions required by law have been paid, a vested right does not attach under an application to make a soldiers' additional entry pursuant to section 2306, Revised Statutes, and therefore the submission of proof upon such application does not, in the absence of the payment of the fees and commissions, bar an inquiry relating to the mineral character of the land as of a date subsequent to the submission of the proof.

FINNEY, *First Assistant Secretary*:

By decision of July 25, 1923, the Department afforded the Van Dyke Copper Company a period of 30 days from notice of said decision within which to amend its protest against the application 047757 of James R. Malott to enter, under section 2306 of the Revised Statutes, the S.  $\frac{1}{2}$  SW.  $\frac{1}{4}$ , Sec. 28, T. 1 N., R. 15 E., G. & S. R. M., Phoenix land district, Arizona, so as to charge that at the date of

the filing of said application, the protestants were in possession and occupancy of the Peking, Los Angeles, El Paso, and Dunlap lode mining claims, each partly in conflict with said application and that the protestant was then diligently engaged in the prosecution of work leading to the discovery of mineral on said claims and has since continued in such occupancy, possession, and diligent prosecution of work. The period for the filing of such amended protest was from time to time extended and on January 15, 1924, the date to which the last extension was granted, a duly verified and corroborated amendment of said original protest was filed.

The soldiers' additional application was filed June 15, 1920, and was based on a recertified right. Contemporaneous publication and posting of notice of the application for a period of 30 days commencing June 22, 1920, was had and proof of such publication and posting was filed in the local office August 12, 1920. The original protest of the Van Dyke Copper Company against the application was filed August 4, 1920, and within the time named in a notice for the filing of objections to the application, and charged in substance that three of the four lode mining claims above named, were located October 18, 1916, and the fourth February 5, 1917, and that all were conveyed by the locator to the protestant April 7, 1917; that all of said claims are partly in conflict with the application, and that the land in controversy is mineral in character.

After a hearing had been ordered on said protest and a date set therefor, the protestant on November 13, 1922, and two days prior to the date set for the hearing, filed a motion for a continuance for a period of six months alleging in support of the motion that the protestant was then engaged in the drilling of a hole on the Los Angeles claim for the purpose of "further establishing and demonstrating the mineral character of the land embraced in said mining claim, in addition to that already proven by the location work and annual labor;" that said hole had then attained a depth of 300 feet and that under favorable conditions the protestant could continue the drilling of said hole at a rate of approximately 400 feet a month; that "if allowed to continue said drilling operations for the period of six months after the date hereof, the protestant will attain sufficient depth in said drill hole to further demonstrate the mineral character of said group." It was declared that with the information so stated to be established "there will be no doubt as to the mineral character of this ground, and that the Department will be enabled to pass upon the same without a possibility of being obliged to reverse its decision upon the establishment of an additional commercial and valuable body of ore lying at depth beneath the surface of said claim."

On appeal by the protestee from the action of the local officers in allowing the continuance asked in the motion, the Commissioner of

the General Land Office by decision of February 21, 1923, held among other things that on August 12, 1920, the applicant had done all that was required of him so that on that date his rights vested if prior thereto the land in controversy was not shown to be mineral in character, and disapproved the action of the local officers in allowing a continuance of the hearing for the purpose stated. From said decision of the Commissioner, the protestant appealed to the Department urging that the Commissioner erred, among other things—

In not recognizing and directing that any evidence tending to prove occupation of the mining claims in question and prosecution with reasonable diligence of work leading to discovery at the time of such soldiers' additional application, will be competent and relevant and that what constitutes occupation and prosecution with reasonable diligence of work leading to discovery is dependent upon the circumstances of each case.

Based upon that assignment of error, the Department in its decision of July 25, 1923, said:

The Commissioner's decision did not, as from the sixth and seventh assignments of error, the protestant seems to assume, limit the scope of the evidence to be adduced at the hearing to the question of discoveries made within the limits of the mining claims in conflict with the application prior to August 12, 1920. What the Commissioner clearly intended to hold, and, in substance, did hold, was that the applicant having, on August 12, 1920, apparently done all that he was required to do in order to perfect his application, thereby acquiring a vested right in the land if then nonmineral in character, no evidence relative to discoveries of mineral within said conflict areas after that date would be admissible at a hearing had on the charges made in the protest. The decision did not forbid the production of evidence by the protestant tending to show the mineral character of the land as of August 12, 1920, and did not purport so to do.

The Commissioner did not, as alleged in the eighth assignment, err in failing to direct that evidence tending to show occupancy of the mining claims in question at the time of the filing of the application, and the diligent prosecution of work thereon leading to discovery, be admitted at the hearing as competent and relevant to the issues involved in the case, for the reason that no matters that such evidence would tend to support were alleged in the protest, or otherwise even suggested by the record before the Commissioner. In a brief filed to support the present appeal, however, unverified statements to that effect are made, and these, if regularly substantiated, after proper charges duly served upon the applicant, would open the way to a consideration by the Land Department of discoveries made after the completion of the application, for land included in a mining claim in the occupancy of a mineral claimant, diligently engaged in the prosecution of work leading to discovery of mineral thereon is clearly not subject to application and entry under the provisions of section 2306 of the Revised Statutes, so long, at least, as such occupancy and the diligent prosecution of discovery work continues. *Atherton v. Fowler* (96 U. S., 513). But the Land Department can not take cognizance of unverified allegations contained in a brief as grounds for broadening the scope of a hearing. The protestant, however, will be afforded thirty days from notice within which to file a verified amendment of its charges against the ap-

plication of Malott, and if such amendment be so filed, appropriate action, in accord with the views herein above expressed, will be taken thereon.

In the amendment to the protest, now before the Department, it is alleged in substance that from April 7, 1917, the date of the purchase by the protestant of the four claims named, the said claims have been in the occupation and possession of the protestant; that during said entire period the protestant "has duly performed the annual assessment work upon each of said claims required by law to be performed by the possessors of mining claims, and during those years when the acts of Congress directed the filing of notices of desire to hold mining claims, such notices were filed;" that the property of the protestant, of which the four claims in question constitute a part, comprises one group of "mining property" and mining claims under common ownership; that in November 1916, a drill hole denominated the No. 1, was commenced by the protestant on property owned by it in the S.  $\frac{1}{2}$  NW.  $\frac{1}{4}$ , Sec. 30, of the township in which the land in question lies, which subdivision is situated about a mile and a half to the west of the said land; that a body of copper ore in commercial quantity was encountered in said drill hole and that drilling was there discontinued in May, 1917, but not until after the purchase by the protestant of the four claims partly in conflict with the application; that the ore encountered in said drill hole constituted the first discovery of copper ore of adequate commercial value east of what is known as the Miami fault and in the fault block in which the four claims are situated; that after the discovery of said ore body, plans were adopted by the protestant for the subsequent exploration and development of its said property; that in May, 1917, in conformity with the plan of exploring said property "in the adoption of which plan weight was given to the discoveries and developments of valuable bodies of copper ore in the adjoining and adjacent properties and to the geological structure of the district," the drilling of a second hole known as No. 2 was commenced by the protestant at a point in the S.  $\frac{1}{2}$  NE.  $\frac{1}{4}$  of said Sec. 30, at a point about one-half mile to the east of said drill hole No. 1, and about one mile west of the land in controversy, and on property owned by the protestant "it having been decided that exploratory work at that point would determine whether or not an ore body existed to the east of the first drill hole;" that work on said drill hole No. 2 was suspended in February, 1919, because of inability to secure supplies, material, and labor then needed for the war, and because of labor difficulties in the district; that the indications of ore in the said No. 2 hole were good, and that the hole was cased and covered to secure its preservation; that in May 1919, a double compartment shaft was sunk at a point about 100 yards to the east of said drill hole No. 1; that said shaft, which

was 6 by 11 feet, and fully timbered, was sunk to a total depth of 1,692 feet, when operations were discontinued thereon in April 1921; that at a depth of 1,183 feet, the copper ore body was encountered; that stations were cut at the 1,212 and 1,550 levels, and drifts projected therefrom in both of which ore of commercial value was found; that in the continuance of its mining operations, and for the performance of exploratory work on and in the eastern portion of its property, the protestant, in September 1922, began the drilling of a hole on said Los Angeles claim; that prior to the commencement of said last mentioned drilling operations, it was necessary to perform much preliminary work in aid thereof, as no exploratory work for ore at depth had been done in that immediate vicinity; that an additional geological study was made for the purpose of determining the location of the said hole and the area included in the Los Angeles claim was decided upon; that an automobile road was constructed over the mining claims of the protestant from one of the main thoroughfares of the town of Miami to and upon the Los Angeles claim and at a point near a site for a drill hole for the purpose of supplying water for drilling and other uses in connection with the development of ore in the lode mining claims in question; that a fully equipped derrick was erected on the Los Angeles claim and ample provision made for supplies and for transmitting the same to the claim from the town of Miami; that the protestant has conducted said drilling operations and its other work for the development of its said mining properties with the equipment named; that said development work has been and is continuous, and is being done in good faith for the development of copper ore bodies at depth in the said mining property; that as the result of mining operations conducted upon its property comprising the group, of which the four claims in question constitute a part, the extensive and long continued mining operations of other companies in the said mining district, and in the vicinity of the four claims in question, the opinions of geologists and practical mining men acquainted with the district, and the geological evidence, the protestant has reason to believe, and does believe, that valuable deposits of copper ore exist at depths in said four mining claims and in its said group, and that for that reason the protestant is willing to expend, and is now expending, large sums of money in the prosecution of work leading to the development of such copper ore deposits at depth; that with this end in view it is the intention and purpose of the protestant to continue to prosecute said drilling and its other mining operations with the same vigor in the future that it has in the past.

It is maintained by the protestant in the said protest that it is entitled to the protection of the Department while diligently and continuously employed in the prosecution of the work in which it is engaged and prayed that—

The Department afford it protection against the constant attempts of the protestee to interfere with and stop the progress of its work by his many appeals to the Department urging it to declare that the protestee has a better title to the land involved in this contest than has the protestants; that the land herein involved be classified as mineral land and the alleged entry of contestee thereon be declared void and of no effect; and that the lode locations of protestant be declared sufficient and valid.

The sufficiency of the protest as amended as a basis for a hearing thereon, is challenged by the protestee on the following grounds:

(1) No charge is presented alleging that a valid discovery of mineral has been made upon any or all of the four mining claims in conflict with said additional homestead location, being the Peking, El Paso, Los Angeles, and Dunlap lode claims, or that any such discovery was made, or valuable mineral deposits found within the limits of any of said claims, prior to the perfection of said homestead location on August 12, 1920.

(2) That the affidavits of contest, and amended affidavits of contest, filed on behalf of contestant, including that of January 4, 1924, above mentioned, contain no allegation that contestant was in actual possession and occupancy of the ground embraced in said four mining claims on August 12, 1920, and was then diligently engaged in the prosecution of work thereon leading to discovery; said affidavits so far as they recite any facts of development work done by contestant between the date of its acquisition of said mining claims in 1917, and August 12, 1920, being limited to showing work done on other and disconnected ground lying from a mile to a mile and a half northwesterly thereof, which work could not, of course, be useful to establish actual occupancy of the ground in controversy, and of diligent prosecution of development work thereon leading to discovery.

(3) That none of the work alleged in said affidavits to have been done upon the Los Angeles claim, after contestant acquired the same, is alleged to have been done prior to August 12, 1920, and the record now satisfactorily shows that said last mentioned work was all done after that date.

(4) No discovery of mineral within the limits of any of said four mining claims having been alleged to have been made prior to August 12, 1920, the mineral locations conferred no rights upon contestant, as against defendant, in the absence of actual occupancy of the ground embraced in the same, while diligently prosecuting work thereon, and no such actual occupation and doing of work on said ground prior to August 12, 1920, being alleged, no sufficient charge is made in contestant's affidavits to justify a hearing.

From the allegations contained in the amendment of the original protest and the briefs filed by the protestant it is evident that the protestant seeks to be afforded an opportunity to establish the character of the land here involved, and the existence of discoveries within the limits of the claims in controversy, on the basis of development and disclosures that may have been already made since the

filing of the original protest, or that may be made at some point of time in the future and prior to a hearing on the protest. The competency and admissibility at the hearing of evidence of the result of any work performed after August 12, 1920, appears to be challenged by the protestee on the ground that the protestant has failed to allege actual occupancy and possession by the protestant of any portion of the land included in the application, or of any mining claim in conflict with the application, and the diligent prosecution of work within the limits of any of the claims in question looking to an adequate discovery of mineral thereon; until a period commencing more than two years after the above-mentioned date, when, it is asserted, the protestee, by the submission of proof of publication and posting of notice of his application, had completed a compliance with all the requirements of the law under which his application was filed, and became vested with an equitable title to the land. An examination of the record of the application, however, fails to disclose the payment by the applicant of the fees and commissions necessary to the completion of the application, while informal inquiry at the General Land Office elicits information that tends almost conclusively to show that no such payment has been made. This being the case, there seems to have been no basis for the Commissioner's holding, in the decision of February 21, 1923, and none for the protestee's present contention, that the applicant had on August 12, 1920, or, indeed, at any date, earned an equitable title to the land by a compliance with all legal requirements; so as, in any event, to bar the establishment in the present proceeding of the mineral character of the land, or the validity of the mining claims, as of a date subsequent to the submission of said proof or prior to a hearing on the protest. It is true that under departmental regulations relating to soldiers' additional entries the applicant was not required to pay the fee and commissions until the local officers should be authorized by the Commissioner to allow the entry, that no such authority has yet been given the local officers, and hence that up to the present time the applicant has complied with all of the requirements essential to the maintenance of his claim. Those facts, however, can not be accepted as giving rise to a vested right or an equitable title in the claimant with respect to the land included in his application or any portion thereof.

Under all the circumstances shown the Department sees no reason why under the protest as now amended the protestant may not introduce evidence to support all of the allegations therein contained. The hearing will accordingly be had on the basis here indicated, and the decision of the Commissioner is further so modified.

**IRRIGATION OF ARID LANDS IN NEVADA—PARAGRAPH 7(A),  
CIRCULAR NO. 666, AMENDED.**

**INSTRUCTIONS.**

These instructions were promulgated by the General Land Office, April 9, 1924, as Circular No. 927.—Ed.

Dec 49 110 328

DEPARTMENT OF THE INTERIOR,  
Washington, D. C., March 25, 1924.

**THE COMMISSIONER OF THE GENERAL LAND OFFICE:**

Paragraph 7a of the regulations of January 12, 1920, Circular No. 666 (47 L. D., 310), as revised October 25, 1922 (49 L. D., 328), under the so-called Pittman Act of October 22, 1919 (41 Stat., 293), provides that the final proof, to be submitted within two years from the date of the permit, must show that a *profitable* agricultural crop has been produced upon not less than 20 acres of the land described in the permit.

Experience has demonstrated that while a crop can be produced during the first year after securing sufficient water for irrigation, few of the permittees have been able to produce a *profitable* crop during that year.

Being convinced that the intent of Congress warrants the amendment of the existing regulations, paragraph 7(a) is hereby amended to read as follows:

Unless granted an extension of time, the permittee is allowed two years from the date of his permit in which to complete the work of exploration, and whenever he shall within that time satisfactorily establish that sufficient water has been discovered, developed, and made permanently available to produce a profitable agricultural crop other than native grasses, upon not less than 20 acres of the land described in the permit, he will be entitled to patent for one-fourth of the land embraced in the permit. No mere perfunctory or questionable compliance with the law will be accepted. It must appear that an agricultural crop has been actually raised—not necessarily a paying or profitable crop, but such a crop as will satisfy the Secretary of the Interior that in time and under ordinary circumstances profitable crops of some sort can be produced from the land. No patent will be granted until the full 20 acres have been cleared, leveled, ditched, plowed, fenced, and an agricultural crop actually planted and raised by irrigation, all in accordance with good farming practice. The wells, pumps, or other works and equipment for the development and supplying of water must be of a permanent and dependable character, suitable for use year after year. A detailed statement of costs of irrigation and production of crops from such water supply will be required; to this end, accurate account should be kept of such costs. No patent can be granted under the act if the cost of irrigation from the developed water supply is practically prohibitive; the act requires a successful development and demonstration of the use of subterranean water, as the principal condition precedent for patent.

The Department has been advised that a large number of permittees under the said act have for several months hesitated to undertake the expense necessary for the development of artesian water, fearing they would be unable to produce a *profitable* crop during two years. Therefore, as to all permits outstanding at this time, you will adopt a liberal policy on applications for extension of time, where it appears that the permittee is acting in good faith.

E. C. FINNEY,  
*First Assistant Secretary.*

### CITIZENS LIGHT, POWER AND WATER COMPANY.

*Decided March 28, 1924.*

#### TRADE AND MANUFACTURING SITE—ALASKA.

Under the principle *de minimis non curat lex*, the right to acquire a trade and manufacturing site in Alaska under section 10 of the act of May 14, 1898, which specifies that one claim only may be purchased by any one person, association, or corporation, will not be denied to a corporation merely because a minority interest of its stock is owned by stockholders who are also holders of minority stock in another corporation that had acquired title to public lands under that act.

#### TRADE AND MANUFACTURING SITE—ALASKA—LAND DEPARTMENT.

A regulation issued pursuant to section 10 of the act of May 14, 1898, requiring, in connection with an application for a trade and manufacturing site in Alaska by an association or corporation, a showing that each member thereof has not entered or acquired title to any land under the act, does not exceed the requirements of the act, and is valid.

#### DEPARTMENTAL DECISIONS CITED AND APPLIED.

Cases of Jacob Switzer Company (33 L. D., 383), Silsbee Town Company (34 L. D., 430), J. H. McKnight Company (34 L. D., 443), and John C. Barber (48 L. D., 165), cited and applied.

GOODWIN, *Assistant Secretary.*

The Citizens Light, Power & Water Company has appealed from the action of the Commissioner of the General Land Office, rejecting its application for a trade and manufacturing site in Alaska under the act of May 14, 1898 (30 Stat., 409, 413).

The tract is designated as Survey No. 1261 and is situated about one-half mile northeast of Ketchikan. The proof shows that the tract has been occupied by the applicant since 1903 and has been improved and used for a power house and other structures. The value of the improvements is stated to be \$52,000. The nature of the industry conducted thereon is the generation of electrical energy for supplying the industrial and domestic needs of the city of Ketchikan.

The application was filed in the local land office June 16, 1919, and, the land being unsurveyed, it was requested that survey be

made. The applicant was incorporated under the laws of Alaska. In the proof in support of the claim, the president of the company stated in part as follows:

It is found that two minority stockholders of the twenty-three stockholders in the said Citizens Light, Power and Water Company were each minority stockholders in the corporation (Northland Duck Company) which acquired title to Amended U. S. Survey No. 1100 entered under the provisions of section 10 of the act of May 14, 1898. I can find no record or evidence of any of the other twenty-one stockholders of said Citizens Light, Power and Water Company now applying, or ever previously having applied for entry of land under the provisions of said section 10, of said act of May 14, 1898, nor of any of the said other twenty-one stockholders ever having connections with any association or corporation which is now applying or has previously applied for entry of land under said act.

Section 10 of the act of May 14, 1898, *supra*, authorizes the purchase thereunder of one claim only by any one person, association or corporation. The regulation issued for administration of that act (45 L. D., 241) provides:

In case the application is made for the benefit of an association or corporation, it must appear that each member thereof has not entered or acquired title to any land entered under the provisions of this act.

It was accordingly held in the decision appealed from that the proof showed a condition incompatible with the said regulation.

It is urged on appeal that the regulation above quoted goes beyond the requirements of the act, and is unauthorized. The construction of this act, as embodied in the regulation above quoted, is in harmony with the rule of administration applied in respect to similar provisions contained in other public land laws. Where the law limits its benefits to one exercise of a right thereunder by an individual or corporation, it has become a well-settled rule that double benefits can not be permitted by one exercise of the right as an individual and another exercise of the right by a corporation of which the individual is a member. See *Jacob Switzer Co.* (33 L. D., 383); *Silsbee Town Co.* (34 L. D., 430); *J. H. McKnight Co.* (34 L. D., 443). In the latter case the reason for the rule is stated as follows:

There is no limit to the number of corporations that may be formed by one person, holding nearly the entire interest, associating with himself two others having only nominal interests. If, under each of such unlimited number of corporate organizations and adopted names a new right is acquired to appropriate public lands, then the policy and purpose of the law is violated, the limitation is nullified, and no limit exists as to the area of land that one individual can acquire, save the total area of the public lands and the means the individual can command. Manifestly, this is urging a legal fiction, in the words of Lord Mansfield, "to an intent and purpose not within the reason and policy of the fiction." The Department will not sanction it.

It is not believed, however, that this rule is applicable to conditions such as here shown where the two stockholders concerning whom the question of disqualification is raised have not heretofore acquired a substantial interest in an entry under this law and who are only minor stockholders in this corporation. Under such circumstances the principle *de minimis non curat lex* may well be applied.

It is noted that this tract was included in Power Site Reserve 753 by Executive order of December 9, 1920, but inasmuch as the application was filed prior to the withdrawal and as section 23 of the Federal Water Power Act of June 10, 1920 (41 Stat., 1063), declares that the provisions of said act shall not be construed as affecting any valid existing claim, the withdrawal affords no obstacle to the allowance of the entry applied for. See case of John C. Barber (48 L. D., 165).

The decision appealed from is accordingly reversed.

### ERICK E. PALMGREN.

*Decided March 28, 1924.*

#### DESERT LAND—FINAL PROOF—CONFIRMATION—WATER RIGHT.

A desert-land entry does not come within the confirmatory provision of section 7 of the act of March 3, 1891, if the final proof shows on its face, at the time of its submission, incomplete and unsatisfactory compliance with law as to appropriation of a water right, and the entryman is required, before the expiration of the two-year statutory period, to remedy the defect or suffer cancellation of the entry.

#### COURT AND DEPARTMENTAL DECISIONS APPLIED.

Rule announced in case of Jacob A. Harris (42 L. D., 611), and approved in case of Lane *v.* Hoglund (244 U. S., 174), applied.

#### GOODWIN, Assistant Secretary:

Erick E. Palmgren has appealed from a decision by the Commissioner of the General Land Office dated October 25, 1923, wherein additional evidence in connection with the appellant's final proof on his desert-land entry was required.

The entry in question was made August 1, 1912, for the SE.  $\frac{1}{4}$  NW.  $\frac{1}{4}$ , N.  $\frac{1}{2}$  SW.  $\frac{1}{4}$ , SW.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , Sec. 20, T. 7 N., R. 34 E., B. M., within the Blackfoot, Idaho, land district. Final proof was submitted on December 28, 1917, and final payment was made on January 4, 1918, but final certificate was withheld at the request of the chief of field division. By letter dated August 5, 1918, the Commissioner directed the local officers to call upon the entryman for satisfactory evidence of appropriation of water from Mud Lake. In re-

sponse to this requirement the entryman requested an extension of time for 90 days, within which to furnish the evidence called for. On April 14, 1920, the Commissioner again called for evidence of water right, as before. In place of evidence of water right by appropriation, the entryman filed a certificate showing ownership of 1267 shares of stock in the Jefferson Irrigation Company, Limited. The case was thereafter held without action to await determination of the status of the irrigation company.

Action having been taken on the Jefferson Irrigation Company, Limited, on September 4, 1923, the Commissioner, in the decision appealed from, directed that the entryman be required to make an additional showing in connection with said company. He appeals from this requirement, contending that the entry must be held confirmed under the proviso to section 7 of the act of March 3, 1891 (26 Stat., 1095, 1099). It is also contended that this entryman should be accorded the same treatment as six other named entrymen for land in the immediate vicinity, as to whose entries the Commissioner has stated:

None of the final proofs submitted by these claimants entirely meets the requirements of the order conditionally approving the project upon which they depend for water. Inasmuch, however, as more than two years have elapsed since the issuance of receiver's final receipt and the claimants are not in default in the matter of compliance with any requirements hitherto made, the entries stand confirmed by operation of law under section 7 of the act of March 3, 1891, and the Land Department is without authority to insist upon a further showing.

There is very clearly a distinction to be made between this entry and those held confirmed by operation of law. Palmgren's final proof was not on its face complete and satisfactory. On two separate occasions, calls were made for additional showing, and there was added a penalty of rejection of the final proof and cancellation of the entry for noncompliance. The entryman never has complied with the requirement that was made. On the other hand, as to the six entrymen, they named the irrigation company as their source of water supply, and no requirement was made of them after final proof.

In construing the act cited, in the case of Jacob A. Harris (42 L. D., 611), this Department said:

Upon mature consideration, the Department is convinced that a contest or protest, to defeat the confirmatory effect of the proviso, must be a proceeding sufficient, in itself, to place the entryman on his defense, or to require of him a showing of material fact, when served with notice thereof.

This language was quoted with approval by the United States Supreme Court in the case of Lane v. Hoglund (244 U. S., 174).

It must, in this case, be held that the letters of August 5, 1918, and April 14, 1920, were such a proceeding as to exclude Palmgren's entry from the act cited.

The decision appealed from is affirmed.

**POTASH REGULATIONS—SECTION 2(A) OF THE LEASE FORM, CIRCULAR NO. 594, AS AMENDED BY CIRCULAR NO. 781, FURTHER AMENDED—SECTION 10, PART III, CIRCULAR NO. 594, AMENDED.**

[Circular No. 925.]

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

*Washington, D. C., March 29, 1924.*

REGISTERS AND RECEIVERS,

UNITED STATES LAND OFFICES:

March 25, 1924, the First Assistant Secretary of the Interior amended Circular No. 594, approved March 21, 1918 (46 L. D., 323), governing permits and leases for potassium; under the act of October 2, 1917 (40 Stat., 297), as amended by Circular No. 781, approved October 10, 1921 (48 L. D., 221).

Section 2(a) of the lease form, Circular No. 594, is amended as follows:

To invest ——— dollars within four years from the date hereof, not less than one-fourth thereof to be expended during each of said four years, in the substantial development and production of the deposits of potassium and other minerals in the land above described, or in the reduction, manufacture, and preparation of such mineral products for market. Such development, reduction works or other improvements for which said investment and expenditures are to be made shall, subject to agreed modifications to meet future conditions, in general, consist of the following:

A new paragraph, 10(a), is added to said Circular No. 594, as follows:

10(a). The lessee shall furnish a bond, with approved corporate surety or with two qualified individual sureties, in the sum of one-tenth of the proposed investment, but in no case less than \$2,500, conditioned upon the expenditure of the specified amount of investment. After the required investment has been made, a bond in a like amount, with approved corporate surety, conditioned upon compliance with the terms of the lease, will be required. With bonds signed by individual sureties must be filed affidavits of justification by the sureties that each is worth double the sum specified in the undertaking over and above his just debts and liabilities in real property exempt from execution, and a certificate by a judge or clerk of a court of record, a United States district attorney, a United States Commissioner, or a United States postmaster, as to the identity, signatures, and financial competency of the sureties. All bonds will be examined from time to time as to their sufficiency, and additional security will be required whenever deemed necessary.

WILLIAM SPRY,  
*Commissioner.*

## ENLOW v. SHAW ET AL.

*Decided March 29, 1924.**See 5120622*

## OIL AND GAS LANDS—PROSPECTING PERMIT—APPLICATION.

An application for an oil and gas prospecting permit under section 13 of the act of February 25, 1920, is, in effect, a mere request that a license be granted and confers upon the applicant no interest in the lands or the mineral deposits therein.

## OIL AND GAS LANDS—PROSPECTING PERMIT—APPLICATION.

Neither the leasing act of February 25, 1920, nor the regulations issued thereunder, give exclusive segregative effect to an application for a prospecting permit and, until the Department has satisfied itself as to the qualifications of the first applicant and issued a permit to him, applications may be filed by others and, if the first application be rejected, their claims will be considered in the order initiated until one is found qualified to receive a permit.

## OIL AND GAS LANDS—PROSPECTING PERMIT—LAND DEPARTMENT—PRACTICE—PREFERENCE RIGHT.

The Land Department deals only with the real parties in interest with reference to the issuance of oil and gas prospecting permits, and equities entitling one to a permit must be asserted and exercised by the party who is predicated a preference right thereupon.

## DEPARTMENTAL DECISIONS CITED, DISTINGUISHED AND APPLIED.

Case of California and Oregon Land Company v. Hulen and Hunnicut (46 L. D., 55), cited and distinguished; cases of Martin Judge (49 L. D., 171), and John T. Kotkin (49 L. D., 344), cited and applied.

FINNEY, *First Assistant Secretary:*

On September 11, 1923, Charles E. Enlow filed an application, pursuant to section 13 of the leasing act of February 25, 1920 (41 Stat., 437), for a permit to prospect for oil and gas upon certain lands in T. 4 N., R. 92 W., 6th P. M., Glenwood Springs, Colorado, land district. This application was held for rejection by the Commissioner of the General Land Office, on January 2, 1924, because in conflict in its entirety with a similar prior permit application, filed on August 11, 1923, by E. S. Shaw, and, as to a part of these same lands, with another prior application for a prospecting permit, filed by George D. Parkinson on July 25, 1923. At the time of this decision, there was in the record evidence of an attempted adjustment of their conflicting claims by Shaw and Parkinson.

On February 11, 1924, Enlow appealed from this decision, pointing out that from August 25, 1920, until September 5, 1923, there was shown upon the records of the local office to be a still earlier application for permit, filed by the Matador Petroleum Company, which was withdrawn by said company on August 11, 1923, but the acceptance of which was not noted upon the records of the local office until September 5, 1923. He claims that, because of this situa-

tion, the lands were not subject to application for permit when Shaw and Parkinson filed their application; that said applications were, therefore, void *ab initio*, and his application, being the first filed after the notation of the withdrawal of said Matador application, which is claimed to be, in effect, a restoration, is the first valid application for permit for the tracts involved.

Counsel for the appellees filed a motion to dismiss this appeal, because untimely filed, which the Department has heretofore denied by granting an oral hearing, which has been had, and at which the appellant's counsel, while conceding that the matter is one to be determined in the sound discretion of the Department, claimed that the orderly administration of the leasing act required the adoption of the rule contended for, and that such rule had, in fact, heretofore been adopted by the Department. The case of Joseph S. Hare, A-3123 (unreported), decided May 20, 1922, was cited on this point. It was also urged and affidavits showing the facts alleged were furnished, that Enlow is equitably entitled to priorities over these appellees because, on August 26, 1923, R. D. Meyer, "associate of and acting in the same interest as appellant," went to the local office intending to make application for a prospecting permit for the land involved, but that he did not file said application upon being advised by the local officers that the Matador Petroleum Company had a pending application which would necessitate the rejection of his application.

An application for a permit to prospect for minerals pursuant to the leasing act is a mere request that a license be granted, and confers upon the person making such application no interest in the land described or the mineral deposits therein. The filing fees, paid in connection with such applications, will be refunded if the application is thereafter withdrawn or rejected. John J. Kotkin (49 L. D., 344). It is not analogous to a patent, reservation, entry, or selection, which was held in the case of California and Oregon Land Company *v.* Hulen and Hunnicutt (46 L. D., 55) to have the kind of segregative effect claimed by this appellant to exist with respect to the Matador Petroleum Company's application. In the case of Martin Judge (49 L. D., 171), the Department extended the above-stated rule to *permits* issued under the leasing act, on the ground that their relinquishment was required to be accepted by the Commissioner; but, in so doing, said: "It is recognized that a permit does not constitute a technical *segregation* or entry."

In the case of a permit application, its withdrawal may be accepted and noted upon the records of the local office by the local officers; nor is there any other valid reason apparent to the Department why such applications should be given a segregative effect.

If such were the case, the purposes of the leasing act, which are to encourage prospecting operations, could be greatly hampered by persons who were disqualified to take a permit, or who merely wished to trade on their filing with no intention of taking a permit, by withholding prospectively valuable lands from disposal until the Department reached the case in due course, oftentimes months after filed, or only when persons wishing to develop the lands in good faith had assumed the burden of bringing the matter to the attention of the Department by protest, and without any assurance that, when the application was rejected, they would be the first claimant in point of time or otherwise found entitled to a permit.

Nor do the records substantiate appellant's claim that the practice of the Land Department has heretofore been to recognize a permit application as having a segregative effect. In the case of Joseph S. Hare, *supra*, cited by the appellant, the Department merely affirmed the decision of the Commissioner, which rejected Hare's application for a permit to prospect for coal because of its conflict with a *prior* application for a similar permit by Chris Jacques and Ted E. Jones. It was not held that Hare initiated no claim; and it was assumed that, in rendering his decision, the Commissioner had observed the rule stated by the Department in the earlier case of John C. Boyd, A-2577 (unreported), decided March 15, 1920, in which the Department said, with respect to a conflict by Boyd's application with an earlier filing by one Barth:

The application of Barth appears to be regular in all respects, and entitled to priority. He was not required under the regulations in effect at the time his application was made, February 5, 1921, to file a bond at that time, and he has not been called upon to do so. *Boyd's application should not be finally rejected until Barth's is completed* by the submission of a proper bond. [Italics supplied.]

In the recent case of Eaton *v.* Butts, A-5823 (unreported), decided February 20, 1924, the Department considered the same claim as is made by this appellant, and held:

There is nothing in the leasing act nor the regulations thereunder which gives exclusive segregative effect to a mere application for a prospecting permit. Until the Department has satisfied itself as to the qualifications of the first applicant and issued a permit to him, applications may be filed by others and if the first application is rejected their claims will be considered in the order initiated until one qualified to receive a permit is found after which all subsequent applications must be rejected.

The foregoing also is true with respect to withdrawals of applications for prospecting permits and as Laura Butts initiated the first application after Baroch, she is entitled to a permit if qualified (as she appears to be) and Eaton's application was properly rejected.

From the foregoing it is clear that, even though the Department was willing to change its practice to conform to the appellant's

views, such change could not properly be given retroactive effect so as to entitle him to precedence over the appellees.

Appellant's claim of equities based upon the failure of R. D. Meyer to make application is based upon a privity with some undisclosed principal. The Department finds nothing in Meyer's conduct which would have vested him with equities sufficient to defeat the *bona fide* intervening applications of the appellees. Consequently, appellant can, under no circumstances, gain anything thereby. Assuming that Meyer did have such equities, he alone could assert them; or, if the principal desired to be recognized, it would have to come forward in its own right and, after showing its qualifications to receive a permit, would be required to show wherein it was equitably entitled to a preference, as the Department deals only with the real parties in interest in issuing prospecting permits.

The Commissioner's decision is modified to permit the suspension of appellant's application until it is found whether Parkinson and Shaw are entitled to permits, and if such be the case the rejection of his application will be made final.

### WILLIAM H. DAVIS.

*Decided March 31, 1924.*

#### TIMBER AND STONE ENTRY—COAL LANDS—WITHDRAWAL—SURFACE RIGHTS—STATUTES.

The act of June 22, 1910, which authorizes entries under certain nonmineral land laws of the surface of lands, withdrawn or classified as valuable for coal, does not include either expressly or by implication entries under the timber and stone act.

#### TIMBER AND STONE ENTRY—COAL LANDS—RESERVATION—SURFACE RIGHTS—STATUTES.

The act of March 3, 1909, the purpose of which was to preserve the surface claims of persons who had made locations, selections, or entries under the nonmineral land laws for lands thereafter classified, claimed or reported as valuable for coal, is broad enough, both in its terms and intent, to embrace entries under the timber and stone act, subject to the reservations specified in the act of 1909.

#### TIMBER AND STONE ENTRY—COAL LANDS.

Until the determination by the Department that land applied for under the timber and stone act is subject to entry thereunder, and an appraisal has been made, no contract status exists between the Government and the applicant.

#### COAL LANDS—PROSPECTING PERMIT—SECRETARY OF THE INTERIOR—SUPERVISORY AUTHORITY.

The issuance of a coal prospecting permit, which is merely a license, under the act of February 25, 1920, is discretionary with the Secretary of the Interior, and such permit will be issued only where prospecting is necessary to show either the existence or workability of coal deposits.

## COAL LANDS—PROSPECTING PERMIT—ADVERSE CLAIM—SUPERVISORY AUTHORITY.

While the Department may, and occasionally does, issue permits pursuant to the act of February 25, 1920, to prospect unappropriated land even though the evidence before it does not appear to warrant prospecting, yet, where an adverse claim exists, a permit will be issued only upon a clear showing that the land has prospective mineral value.

## COAL LANDS—PROSPECTING PERMIT—APPLICATION—RELATION—ADVERSE CLAIM.

Where there had been no determination by the Department, with full knowledge of the facts, as to the coal character of land, the doctrine of relation can not properly be invoked upon the granting of a prospecting permit under the act of February 25, 1920, to stamp the land as classified, claimed, or reported coal in character for the purpose of defeating an entry initiated after the permit application was filed but before the permit issued.

FINNEY, *First Assistant Secretary*:

William H. Davis has appealed from the decision of the Commissioner of the General Land Office, dated November 20, 1923, which rejected his application, filed December 21, 1922, to make timber and stone entry under the act of June 3, 1878 (20 Stat., 89), for the E.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , E.  $\frac{1}{2}$  NW.  $\frac{1}{4}$ , Sec. 23, T. 4 S., R. 25 W., G. & S. R. M., Little Rock, Arkansas, land district, for the reason that the land is covered by a permit to prospect for coal, granted for these and other lands on February 28, 1923, pursuant to section 2 of the leasing act of February 25, 1920 (41 Stat., 437), to Sarah E. Gallagher, under an application filed by her on April 28, 1922.

In the decision appealed from the Commissioner concluded that there was no authority at law for the allowance of this timber and stone application because of the outstanding permit to prospect for coal, even though the applicant, Davis, who alleged that the land was solely valuable for timber, expressed a willingness to accept a patent for the surface only, with full rights reserved in the United States to prospect for, mine and remove the coal deposits in said land.

In said decision the Commissioner held that the act of March 3, 1909 (35 Stat., 844), which authorized the issuance of surface patents "for lands valuable for coal," was inapplicable because it related to persons who had entered, located or selected "under the nonmineral land laws," lands which were *subsequently* classified, claimed or reported as being valuable for coal, and that the later acts of June 22, 1910 (36 Stat., 583), and April 30, 1912 (37 Stat., 105), which also authorized the issuance of surface patents, each contained an expressed enumeration of the class of entries which could be made, and that said classes did not include applications to purchase lands under the timber and stone act of June 3, 1878 (20 Stat., 89).

The appellant tendered with his appeal the sum of \$440 as "the money required to fulfill his obligations in this case in full," and

claims that he is entitled to the allowance of his application, as to the surface of the lands, which he avers to be noncoal, by virtue of a contract with the Government the terms of which have been fully complied with by him.

The money tendered was received and is held by the receiver, although it does not appear that there has been any determination by the Department that the land is subject to entry under the timber and stone act or that there has been any appraisal thereof as required by the regulations under the timber and stone law. See revision of September 20, 1922; Circular No. 851 (49 L. D., 288).

The land has never been formally withdrawn or classified as valuable for coal, and the Commissioner's decision was apparently based upon the decision rendered by the Department in the case of William R. Brennan (48 L. D., 108), in the matter of a subsisting permit to prospect for oil and gas issued pursuant to section 13 of the leasing act wherein it was held (syllabus):

Land that is not within a designated oil or gas structure is nevertheless to be treated as valuable for oil or gas when embraced within a prospecting permit, and a homestead entry made subordinate thereto must be subject to the provisions and reservations of the act of July 17, 1914.

and also that—

Upon the granting of an oil prospecting permit, rights thereunder attach as of the date of the filing of the application.

This decision was followed by the Department in the case of *State of New Mexico v. Weed* (49 L. D., 580) in which it required the State to accept surface title to lands covered by a subsisting permit to prospect for oil and gas under its selections made under section 7 of the act of June 20, 1910 (36 Stat., 557). In that case the Department further stated that the segregative effect given prospecting permits in the case of *Martin Judge* (49 L. D., 171), which followed the rule stated in *California and Oregon Land Company v. Hulen and Hunnicutt* (46 L. D., 55), was effective as against applications filed under the nonmineral land laws, where said applications were not also made with a reservation of the deposits for which prospecting was authorized in the prior permit.

This appellant has offered to accept a surface patent, and the question now presented is whether there is any law under which such patent could be issued upon his timber and stone entry.

The decisions cited were rendered with respect to claims which were initiated under nonmineral land laws for classes of entries which could be perfected pursuant to the act of July 17, 1914 (38 Stat., 509); for lands withdrawn, classified or reported as valuable for deposits of phosphate, nitrate, potash, oil, gas or asphaltic minerals; and involved cases where, as in this case, the nonmineral claims

were initiated after applications for permits to prospect for oil or gas had been filed, but before such permits had issued. Thus, as in this case, permits were issued before adjudication of the nonmineral applications was made by the Commissioner.

Under the act of July 17, 1914, *supra*, there is reserved in connection with the mineral deposits the right of the Government and its lessees and *licensees* to *prospect for*, mine, and remove the reserved deposits, which, as was pointed out in the case of *Edward D. Foster v. Treava G. Hess* (50 L. D., 276), indicated the clear intent of the Congress that lands offering a favorable opportunity for *prospecting* were to be disposed of under the nonmineral land laws only, with the reservations prescribed in said act.

The acts of March 3, 1909, and of June 22, 1910, *supra*, likewise authorize the allowance of nonmineral entries for lands valuable for coal with a reservation of said deposits together with the right of the Government and those in privity with it "*to prospect for, mine, and remove*" [italics supplied] coal therefrom, so that lands *prospectively* valuable for coal may only be disposed of under such nonmineral land laws as authorize entries which shall contain the foregoing reservations.

In the timber and stone act of June 3, 1878, under which appellant seeks to purchase the land involved, there appears in section 1 the following inhibition against the sale of lands valuable for coal:

*Provided, That nothing herein contained shall defeat or impair any bona fide claim under any law of the United States, or authorize the sale of any mining claim or the improvements of any bona fide settler, or lands containing gold, silver, cinnabar, copper, or coal.* [Italics supplied.]

Unless, therefore, there has been, by later acts of Congress, a repeal or modification of this provision, this appellant can not purchase lands which are prospectively valuable for coal.

The act of June 22, 1910, *supra*, which authorized the issuance of surface patents for lands valuable for coal, expressly limited its operation to entries under the homestead laws by actual settlers only, the desert-land law to selection under section 4 of the Carey Act, and to withdrawal under the reclamation act. The provisions of this act were extended by the act of April 30, 1912, *supra*, to the sale of isolated tracts and to selection by the several States under grants made by Congress. While the Department has held that Indian allotments and preemption entries, which originate through settlements, are covered by the provision in the act of June 22, 1910, for agricultural entries under the homestead laws by actual settlers (*Bililik Izhi v. Phelps*, 46 L. D., 283; *Martha Head et al.*, 48 L. D., 567; *Clemma E. Motz*, 49 L. D., 667), there is nothing in said act which warrants its interpretation as including timber and stone entries, which are not agricultural entries and do not originate by set-

tlement, nor do such entries fall within any of the other classes specified in said acts.

There remains for consideration the act of March 3, 1909, *supra*. That act provides in part as follows:

That any person who has in good faith located, selected, or entered under the nonmineral land laws of the United States any lands which subsequently are classified, claimed, or reported as being valuable for coal, may, if he shall so elect, and upon making satisfactory proof of compliance with the laws under which such lands are claimed, receive a patent therefor, which shall contain a reservation to the United States of all coal in said lands, and the right to *prospect for*, mine, and remove the same. [Italics supplied.]

It seems clear that this act, whose apparent purpose was the preservation of the claims of persons who had made locations, selections or entries under the nonmineral land laws for lands which were classified, claimed or reported as valuable for coal, is broad enough both in its terms and purpose to include entries under the timber and stone act.

Thus there is presented the question whether the lands here involved were, at the time this appellant filed his timber and stone application, classified, claimed or reported as valuable for coal, or whether such classification, claim or report was *thereafter* made. If the latter be true his entry may be allowed upon this appraisalment of the land, in accordance with the regulations of September 20, 1922 (49 L. D., 288), and upon the filing by him of a formal election to make entry subject to the provisions and reservations of the act of March 3, 1909, *supra*. His rights must be determined as of the time when he filed a completed application accompanied by the required filing fees. Charles C. Conrad (39 L. D., 432); Rippey v. Snowden (47 L. D., 321); Louise E. Johnson (48 L. D., 349).

The ultimate question is, therefore, whether the filing of an application for a coal prospecting permit is the initiation of a claim which, upon the granting of a permit, operates by the rule of relation stated in the cases of William R. Brennan and State of New Mexico v. Weed, *supra*, to bar the allowance of a timber and stone entry with a coal reservation pursuant to the act of March 3, 1909, where said timber and stone application was filed in the interval between the filing of permit application and issuance of the permit.

The leasing act of February 25, 1920 (41 Stat., 437), is entitled "an act to *promote* the mining of coal, phosphate, oil, oil shale, gas and sodium on the public domain" [italics supplied], and authorizes the issuance of permits to prospect for coal in the following terms (second proviso to section 2):

That where prospecting or exploratory work is necessary to determine the existence or workability of coal deposits, in any unclaimed, undeveloped area, the Secretary of the Interior may issue, to applicants qualified under this Act,

prospecting permits for a term of two years, for not exceeding two thousand five hundred and sixty acres; and if within said period of two years thereafter, the permittee shows to the Secretary that the land contains coal in commercial quantities, the permittee shall be entitled to a lease under this Act for all or part of the land in his permit. [Italics supplied.]

The issuance of a permit, which is a license, is discretionary with the Secretary, and may be issued only where prospecting is necessary to show either the *existence* or workability of coal deposits. In observance of the evident purposes of the act it has been the practice of the Department to issue such permits for vacant unappropriated land even though the evidence before it did not appear to warrant prospecting. Where, however, there exists an adverse claim, permits are only issued upon a clear showing that the lands have prospective mineral value.

The record in this case shows that on September 25, 1922, the Director of the Geological Survey reported that data available showed that the lands were underlaid by strata which contain no coal and involve no possibilities of coal occurrence. However, the permit applicant thereafter submitted a sample of coal said to have been taken from a bed 3 to 4 inches thick cropping out upon the land, and the permit was issued.

Although appellant's application was filed long prior to the issuance of the prospecting permit it appears that it was not transmitted at once to the General Land Office as directed in departmental regulations of October 6, 1920 (47 L. D., 474), and was not received and noted upon the records of the General Land Office until September 17, 1923, which was long after permit issued to Sarah E. Gallagher. Had said application been of record it would undoubtedly, under the prevailing practice, have been taken up and disposed of before the coal prospecting permit was issued. Such disposition would have involved a determination whether the lands had such prospective value as warranted the Secretary, in the exercise of his discretion, in granting this permit and rejecting appellant's application.

As there was no determination of the coal character of the land by the Department with full knowledge of the facts, the doctrine of relation can not properly be recognized in this case as stamping the land as classified, claimed or reported, coal in character prior to the filing of appellant's application. The Department will not, on the other hand, be warranted in now recalling the permit, as the permittee is in no way at fault. Under these conditions it is held that appellant's application may stand and consideration thereof may proceed in accordance with the regulations of September 20, 1922 (49 L. D., 288). If the chief of field division finds no objection the land will be appraised in accordance with said regulations, and con-

sideration will then be given the question of the coal character of the land. If the permittee has made discoveries indicating the existence of coal or that further prospecting is warranted a report to that effect will be made, and appellant will be required to consent to accept surface patent pursuant to the act of March 3, 1909. The appellant may, if he so desires, withdraw the money tendered with his appeal. As there was no determination by the Department that the land is subject to timber and stone entry, and no appraisalment thereof, his claim that a contract exists is not well founded.

The Commissioner's decision is modified to conform to the views herein expressed and the case remanded for the action herein directed.

### **MOUNTAIN STATES DEVELOPMENT COMPANY v. TAYLOR ET AL.**

*Decided March 31, 1924.*

#### **OIL AND GAS LANDS—MINING CLAIM—SECTION 37, ACT OF FEBRUARY 25, 1920.**

The fact that one claiming oil and gas land under a placer location gave financial assistance to another who drilled a test well and discovered oil upon other land in the locality, does not alone constitute such diligent prospecting by the former as to bring the land in his claim within the exception clause of section 37 of the act of February 25, 1920.

#### **OIL AND GAS LANDS—MINING CLAIM—POSSESSION.**

Right of possession to a claim under the mining laws prior to discovery is accorded only so long as the claimant remains in actual physical possession of the land and in diligent prosecution of prospecting operations, and where there has been no discovery, the mere performance of so-called assessment work will not prevent relocation by another.

#### **OIL AND GAS LANDS—MINING CLAIM—POSSESSION—SECTION 37, ACT OF FEBRUARY 25, 1920.**

The exception clause of section 37 of the act of February 25, 1920, did not confer upon a claimant of a group of placer claims of oil and gas lands, upon which no discovery of mineral had been made, a right to retain them unless he had been in actual continuous possession of each claim and in diligent prosecution of prospecting thereupon up to the time of the passage of that act.

#### **OIL AND GAS LANDS—PROSPECTING PERMIT—ACT OF JANUARY 11, 1922.**

Group development under an oil and gas prospecting permit issued pursuant to the act of February 25, 1920, is not recognized as performance of the conditions of the permit, but as such diligence in an effort to procure the performance necessary to warrant the extension of time authorized by the act of January 11, 1922.

#### **OIL AND GAS LANDS—PROSPECTING PERMIT—SECRETARY OF THE INTERIOR—SUPERVISORY AUTHORITY.**

The act of February 25, 1920, contains a positive direction that oil and gas deposits be disposed of only as provided therein, and is mandatory to that extent, but the act of January 11, 1922, vests the Secretary of the Interior with special discretionary powers with respect to the granting of extensions of time for the performance of the conditions in prospecting permits.

## OIL AND GAS LANDS—PROSPECTING PERMIT—MINING CLAIM—POSSESSION.

The principle of group development, recognized by the Department in connection with the granting of extensions of time for the performance of the conditions in prospecting permits issued pursuant to the leasing act, has no application to like development of more than 160 acres under the placer mining laws by one not in possession, or entitled against others to possession of the lands claimed.

## DEPARTMENTAL DECISIONS CITED AND APPLIED.

Cases of Charles R. Haupt (48 L. D., 355), and Cotner *et al. v. Isgrig et al.* (49 L. D., 224), cited and applied.

FINNEY, *First Assistant Secretary*:

The Mountain States Development Company has appealed from the decision of the Commissioner of the General Land Office dated October 2, 1923, which dismissed its protests against the issuance of permits to prospect for oil and gas, pursuant to section 13 of the leasing act of February 25, 1920 (41 Stat., 437), to N. G. Morgan and S. D. Huffaker, under their application, filed June 30, 1923, for the NE.  $\frac{1}{4}$ , Sec. 21, NW.  $\frac{1}{4}$ , Sec. 22, T. 22 S., R. 19 E., S. L. M., Salt Lake City, Utah, land district, and to Harold B. Taylor, who, on July 2, 1923, filed application for the SW.  $\frac{1}{4}$ , W.  $\frac{1}{2}$  SE.  $\frac{1}{4}$ , SE.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , Sec. 33, S.  $\frac{1}{2}$  SE.  $\frac{1}{4}$ , Sec. 34, said township, and held that it had failed to establish that it is the owner of valid mining claims for the land described which entitled it to retain them under the general mining laws, as provided in section 37 of the leasing act, *supra*.

Appellant claims to be the owner of placer mining locations, made in January and May, 1919, by its grantors; that, on the 15th of February, 1920, its agent entered upon the lands and commenced the preparation of the claims for drilling operations by leveling off of sites for the drilling rigs and for the buildings necessary for drilling operations, and that there was spent in this work more than \$100 on each claim. It also claims expenditures of \$100 upon each claim in May and June, 1922, and in June, 1923. The work is claimed to consist of the drilling, in 1922, of a 12-inch hole in each claim to depths of about 60 feet each, and, in 1923, to consist of the drilling of a 6-inch hole in each claim to depths of about 35 feet each. These expenditures are claimed to constitute "annual assessment work" under the placer mining laws. No discoveries of oil and gas upon any of these locations are claimed by the appellant, who claims, however, to have been in continuous possession of said claims since February 15, 1920, and to be entitled to hold said claims, because, in February, 1920, it decided to participate in the drilling of a test well upon certain claims in Secs. 3, 4, 9, and 10, T. 21 S., R. 19 E., S. L. M., owned by the Crescent-Eagle Oil Company, and to that end acquired a very large stock interest in said company. It is further alleged

that the Crescent-Eagle Oil Company has expended over \$100,000 in drilling operations upon the lands claimed by it, and has sunk one well to a depth of over 2,000 feet, encountering a very good showing of oil.

The "assessment work" and the expenditures made in acquiring an interest in the Crescent-Eagle Oil Company are claimed to be sufficient to entitle the appellant company to continue to hold the lands until a discovery has been made in the test well, after which it may proceed to make discoveries upon the lands claimed by it, and may secure patents therefor in accordance with the placer mining laws.

The Commissioner denied this claim in the decision appealed from, holding that financial assistance to another company drilling upon other lands was not diligent prospecting upon the lands covered by its own locations, and would not except said lands from the operation of the general leasing act of February 25, 1920, *supra*.

Appellant now claims that the Commissioner erred in holding "that the investment by the stockholders of the Mountain States Development Company in the stock of the Crescent-Eagle Oil Company \* \* \* was not a sufficient evidence of good faith and proper effort to develop the lands of the United States to protect the filings theretofore made by them under the placer mining laws," and cites his decision in a similar case involving the permit application of one Arthur C. Tunison, in which appellant's claims were recognized, and the permit application rejected.

It is also claimed that the Commissioner's decision is a departure from the prevailing practice followed with reference to prospecting permits issued pursuant to the leasing act, which excuses permittees from drilling under their permits provided they are contributing to the cost of a test well on the structure.

The appellant has not made it clear whether it invested its corporate funds in stocks in the Crescent-Eagle Oil Company, if it had authority by law to do so, or whether its stockholders have merely diverted money originally intended to purchase its stock from that purpose, and have purchased stock in the Crescent-Eagle Oil Company, although there are allegations which suggest that both were done.

Section 37 of the leasing act provides, as far as is material hereto, as follows:

That the deposits of coal, phosphate, sodium, oil, oil shale, and gas, herein referred to, in lands valuable for such minerals, \* \* \* shall be subject to disposition only in the form and manner provided in this Act, except as to valid claims existent at date of passage of this Act and thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under such laws, including discovery.

The appellant does not claim to have made any discoveries upon the land involved, and has not shown that it has been in such actual physical possession of the land, from and after February 25, 1920, as would have prevented relocation of said lands by others had the placer mining laws remained applicable. It seems rather to rely upon what may be termed a "constructive" possession, i. e., an un-abandoned claim of right to the undeveloped tracts, with possession and prospecting upon other lands, preparatory to *a determination whether* prospecting would be warranted on the claims covering the land involved.

This theory is wholly contrary to the spirit and expressed provisions of the placer mining laws, which contemplate that not more than 160 acres may be acquired by an association or corporation by virtue of *a discovery* of mineral within the limits of the claim, and accord such association or corporation a right of possession prior to such discovery only so long as it remains in actual physical possession of the land and in diligent prosecution of prospecting operations. Where there has been no discovery, the mere performance of so-called "assessment work" will not prevent relocation by another. See *Cotner et al. v. Isgrig et al.* (49 L. D., 224).

In the present case, it appears that the appellant has purchased mere "paper" locations; and that, even though constructive possession or group development could properly be recognized in some cases, it would be wholly inapplicable here, as appellant, as a separate legal entity, has no ownership in the claims developed by the Crescent-Eagle Oil Company, and, as a shareholder, will reap its just share of any profits made by that company from its prospecting. No reason is apparent why appellant company or its shareholders should, merely because they have previously located near-by lands, be awarded a preferred status with respect thereto, not only over strangers but over other shareholders in the Crescent-Eagle Oil Company. Such claims are clearly not "valid" within the meaning of section 37 of the leasing act.

While it appears that a protest by this appellant against the issuance of a prospecting permit to one Arthur C. Tunison, which was identical in its claims to the protests now under consideration, was sustained by the Commissioner on September 12, 1922, the matter was never brought before the Department for review, and appellant's reliance thereon was not warranted in view of the interpretation of section 37 of the leasing act published prior thereto in departmental regulations under the leasing act, Circular No. 672, approved March 11, 1920 (47 L. D. 437, 467), under the title—"Rights under 'paper

locations,'” in which the following is especially pertinent hereto (page 468):

Obviously a *valid* claim under the former law is one that the courts and the Land Department will protect and respect as against the claims of others. The mere staking and posting of notices do not constitute such a claim, and the regulations so hold.

Any other view as to the construction of section 37 is inconsistent with the provisions of other sections of the leasing law. Section 19 provides for relief, so called, for those persons who initiated claims on the public domain at a time when the lands were not withdrawn or classified; and who, at the date of the act, had not perfected such claims by discovery, and it further provides that where such a claimant had expended an amount equal in the aggregate to \$250 toward the development of his claim, such claimant, if in good faith and the claim was initiated prior to October 1, 1919, would be entitled to a prospector's permit for the area embraced in his claim.

The provisions of the *relier* sections (18, 18a, 19, and 22), were the subject of extended consideration by the committees of Congress, and it is clear that the provisions of section 19 are just as far as Congress intended to go in the protection of claims and locations of the class here under discussion. To construe the act as validating mere “paper locations” would be placing Congress and this department in the position of saying that one who had expended \$250 on his claim would be entitled only to a prospecting permit, while one who had only a stake and notice would be left with the privilege for an indefinite time of ultimately getting absolute title.

In this case, the appellant company, on February 25, 1920, had merely caused work to be commenced, which, when completed for that year, was not shown to amount to at least \$250, and it would not have been entitled to a preference right to a permit to prospect upon the land. In order to have earned a right to retain an interest in the land under section 37 of the act of February 25, 1920, it is clear that only actual continuous possession of each claim, with diligent prospecting thereon, was intended to be recognized as withholding the land from the operation of the leasing act.

There is no proper analogy between “group development” recognized by the Department in the case of prospecting permits and like development of more than 160 acres by a claimant under the placer mining laws who is not in possession of, or entitled against others to possession of the lands sought. The group development under permits is not regarded as performance of the conditions of the permit, but as such diligence in an effort to procure such performance as warrants extensions of time pursuant to the act of January 11, 1922 (42 Stat., 356). Under that act, special discretionary powers are vested in the Department; but under the leasing act, there is a positive direction that oil and gas deposits be disposed of *only* as provided in said act, unless claimed by parties of the excepted class, to which this appellant does not belong.

The only grounds presented which would warrant the denial of the pending applications for permits by these appellees is the alleged

discovery of oil prior to the filing of their applications. If appellant can furnish sufficient additional data to convince the Department that such discovery established the productivity of the geologic structure on which the well is located, and that such structure embraces the lands involved herein, the Department's definition of the structure as producing would relate back to the time of discovery and preclude the issuance of prospecting permits. Charles R. Haupt (48 L. D., 355). In such case, the lands will be subject to lease, pursuant to section 17 of the leasing act.

The Commissioner's decision is, therefore, modified to conform to the views herein expressed; and, unless within 30 days from notice the showing indicated is furnished by appellant, the dismissals of its protests will become final, and permits will be issued, in the absence of other objections, to these appellees. The records are returned to the General Land Office for the action directed herein.

### HELEN F. CURNS.

*Decided April 1, 1924.*

#### OIL AND GAS LANDS—PROSPECTING PERMIT—CONTIGUITY—COMPACTNESS—WORDS AND PHRASES.

A departmental regulation limiting the maximum area over which prospecting of incontiguous tracts of public lands for oil and gas may be conducted under one permit to a township, that is, an area 6 miles square, is a liberal interpretation of what constitutes an area in a "reasonably compact form" within the meaning of section 13 of the leasing act, and will not be modified except in special cases.

#### OIL AND GAS LANDS—PROSPECTING PERMIT.

Nothing in the act of February 25, 1920, either directs or suggests that an applicant for an oil and gas prospecting permit shall be entitled in every instance to be awarded a permit for the maximum area authorized by the act.

#### DEPARTMENTAL DECISION CITED AND APPLIED.

Case of Fred Mathews (48 L. D., 239), cited and applied.

#### FINNEY, *First Assistant Secretary*:

On March 26, 1923, Helen F. Curns filed application, pursuant to section 13 of the leasing act of February 25, 1920 (41 Stat., 437), for the SW.  $\frac{1}{4}$  NW.  $\frac{1}{4}$ , SW.  $\frac{1}{4}$ , SW.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , Sec. 34, T. 21 N., R. 10 W., SW.  $\frac{1}{4}$  NW.  $\frac{1}{4}$ , SW.  $\frac{1}{4}$ , SW.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , Sec. 2, all Sec. 12, all Sec. 26, T. 20 N., R. 10 W.; all Sec. 18, all Sec. 28, NE.  $\frac{1}{4}$ , Sec. 30, T. 20 N., R. 11 W., N. M. P. M., Santa Fe, New Mexico, land district, containing 3,198.40 acres. This application was withdrawn as to Sec. 18, T. 20 N., R. 11 W., so as to reduce the area to 2,560 acres, the maximum

area authorized to be included in a single permit under the leasing act.

By decision dated December 4, 1923, the Commissioner required the applicant to amend her application to include only such tracts as lie within a general area six miles square, on penalty of its rejection as to all Sec. 28, NE.  $\frac{1}{4}$ , Sec. 30, T. 20 N., R. 11 W., sixth P. M., if no election was filed.

The applicant has appealed from this decision and alleges that, because of prior disposals of the intervening lands she has made application in a "reasonably compact form" within the meaning of section 13 of the leasing act, and in accordance with departmental regulations thereunder approved March 11, 1920 (47 L. D., 437), which provide that "incontiguous tracks within a limited radius may be included in a permit when conditions are such that because of prior disposals a reasonable area of contiguous land can not be procured." She alleges that all these lands occupy an area shut off by mountains which prevent the taking and working of additional lands up to 2,560 acres within an area of 6 miles square which would include the areas applied for in Ts. 20 and 21 N., R. 10 W.

Appellant's claim is based upon the assumption that the maximum acreage authorized by the leasing act to be included in one permit may be applied for and that such regulations as may be made by the Department can only be made so as not to diminish her right to a permit for such maximum area.

There is nothing in the leasing act which expressly directs or indeed suggests that the maximum area may at all times be applied for and the issuance of a permit therefor insisted upon by the applicant.

On the contrary, the expressed requirement that permits for surveyed lands cover an area in a reasonably compact form suggests a limitation which must prevail as against the provision that prospecting permits shall be issued for "*not to exceed two thousand five hundred and sixty acres*" [italics supplied]. The fact that but one test well is required to prove the oil-bearing character of all the land covered by a permit, thus making it subject to lease, also presents an added reason for holding that one permit can only be issued for incontiguous tracts which are, as stated in the regulations of March 11, 1920, *supra*, "within a limited radius."

The Department has heretofore held on numerous occasions, as pointed out in the case of Fred Mathews (48 L. D., 239), that a general area equal to a township, that is, an area 6 miles square, represents the maximum over which prospecting can properly be carried on under one permit, pursuant to the leasing act. This construction of what constitutes an area in a "reasonably compact

form" within the meaning of section 13 of the leasing act is one of extreme liberality which the Department will not be warranted in modifying by way of enlargement except in cases involving special conditions and the serving of the purposes of the leasing act to a far greater degree than the facts in this case disclose would be done if appellant's claim was allowed.

The Commissioner's decision is affirmed and the case is closed.

*Decided, 56-210, 325, 328*  
*32210*  
**WAGONER v. HANSON.** *See 51210 128*  
*see 532d 577*

*Decided April 1, 1924.*

**WATER RIGHT—VESTED RIGHTS—IMPROVEMENTS—POSSESSION—PREFERENCE RIGHT—STOCK-RAISING HOMESTEAD.**

Where one, by the construction of a tank upon a tract of public land, acquires a vested right to use water by section 2339, Revised Statutes, and is in possession of the surrounding land, he will be accorded a preference right to acquire title to the land upon which his improvements are situated under an appropriate land law as against another who has been allowed to make an entry under the stock-raising homestead act.

**COURT AND DEPARTMENTAL DECISIONS CITED AND APPLIED.**

Cases of *Atherton v. Fowler* (96 U. S., 513), *Lyle v. Patterson* (228 U. S., 211), *Krueger v. United States* (246 U. S., 69), *Denee v. Ankeny* (246 U. S., 208), *Jones v. Arthur* (28 L. D., 235), and *Burtis v. Kansas* (34 L. D., 304), cited and applied.

**FINNEY, First Assistant Secretary:**

This is an appeal by Leslie R. Hanson from a decision of the Commissioner of the General Land Office dated October 13, 1923, holding for cancellation, on the contest of Robert W. Wagoner, his entry under section 1 of the stock-raising homestead act, allowed October 15, 1920, for all of Sec. 27, T. 5 N., R. 3 W., G. & S. R. M., Phoenix, Arizona, land district.

The contest was initiated January 16, 1923, on the charge—

That said entryman filed on the above tract for speculative purposes to acquire improvements and water developed by prior settler; entryman never established residence on the land or improved the same; entryman secured additional time to establish residence on false, fraudulent, and misleading statements, and failure to establish residence not due to service in Army or Navy of United States.

The local officers, before whom the hearing was held, found that the testimony does not show any fraud in obtaining extensions of time to establish residence; that the charge of failure to establish residence was not established, but that the charge that the entry had been made for speculative purposes to acquire improvements and water developed by prior settler had been proven by a preponderance of

the evidence. They recommended that the entry be canceled. The Commissioner held that the evidence shows that entryman's applications for extension of time to establish residence, while not wholly false, were exaggerated almost beyond the extent of truth; that he had not stated the facts in his petition for the designation of the land, and that the entry was made for speculative purposes in that entryman desired more to get possession of the improvements and water tank than he did to get possession of the land for stock-raising purposes.

According to the evidence submitted at the hearing, there were located on the NE.  $\frac{1}{4}$ , said Sec. 27, at the date of Hanson's application and when his entry was allowed, a tank, a house, and other improvements, owned by contestant. The tank, known as the Brill tank, is approximately 600 by 1,200 feet, and notice of its location was recorded in 1912. It had been maintained for many years prior thereto, having been constructed when the land was unsurveyed. Its maintenance was warranted by section 2339, Revised Statutes, which provides in part:

Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same.

In petitioning for designation and in applying to make entry Hanson represented the tract to be vacant public land. He misrepresented material facts, and had apparently deliberately planned to acquire the valuable property of another. There was a total absence of good faith, and the entry can not be allowed to stand. Wagoner was in possession of the land surrounding the tank under color of title; hence Hanson's attempt to secure title thereto was illegal. See *Jones v. Arthur* (28 L. D., 235), *Burtis v. Kansas* (34 L. D., 304), *Atherton v. Fowler* (96 U. S., 513), *Lyle v. Patterson* (228 U. S., 211), *Krueger v. United States* (246 U. S., 69), *Denece v. Ankeny* (246 U. S., 208).

The decision appealed from concluded with the statement that contestant, upon the cancellation of Hanson's entry, would be at liberty to file a reservoir declaratory statement under the act of January 13, 1897 (29 Stat., 484), covering the E.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ . It will not be necessary for contestant to file a reservoir declaratory statement. He may make entry for the tract on which the improvements are located under any applicable public land law.

Modified to agree with the foregoing, the decision appealed from is affirmed.

## R. M. STRICKER ET AL.

Decided April 2, 1924.

## ACCRETION—RIPARIAN OWNERSHIP—SURVEY.

In the absence of a statute to the contrary, lands formed by accretion belong to the adjoining riparian or shore owner.

## ACCRETION—RIPARIAN OWNERSHIP—PUBLIC LANDS—SURVEY—PATENT.

Where, prior to divestiture of the Government's title to public land abutting on a meander line, an accretion had formed and the original survey had ceased to correctly represent the approximate shore line, title to the added area does not pass under a patent for the surveyed upland.

## DEPARTMENTAL INSTRUCTIONS APPLIED.

Instructions of April 17, 1918 (46 L. D., 461), applied.

FINNEY, *First Assistant Secretary*:

By letter of March 3, 1923, the Commissioner of the General Land Office submitted for consideration by the Department the application of R. M. Stricker for the survey of an area of lands formed by accretion to the left bank of the Mississippi River after the original survey and adjacent to fractional Sec. 14, T. 5 N., R. 4 W., W. M., Mississippi.

There were also submitted certain other applications filed by Ackland H. Jones and several other parties asking for survey of an area formed by accretion and attached to Glasscock's Island in the Mississippi River in T. 5 N., R. 9 E., La. Mer.

The record shows that fractional Sec. 14, T. 5 N., R. 4 W., was patented to J. B. Galloway, October 20, 1921, following his purchase thereof under the timber and stone act. The area so patented was 30 acres according to the original survey. It was then known that a large area, perhaps 100 acres or more, had formed by accretion in front of that tract, and it appears to have been understood that the title of the purchaser was confined to the surveyed area and did not include the large tract which had attached thereto prior to the sale.

Opposite said fractional Sec. 14, at the time of the original survey, was the island known as Glasscock's Island above mentioned, and according to plat approved February 10, 1836, the island consisted of lots 1, 2, 3, and 4, Sec. 65, lots 1, 2, and 3, Sec. 66, and fractional Secs. 67 and 68, having a combined area of 396.84 acres.

An investigation in the field made in 1922 disclosed that since the date of the original surveys the channel between the said island and the left bank of the river has filled in so that the water now flows on the west side of the island. It is indicated that a portion of the original island on the east side was washed away and that the accretion in the east channel attached to the left bank of the river and built up toward the west until it reached beyond the original

See 39210566

See Vol 6. Cases 4474. Page 396

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location of the east side of the island. There have been large accretions on the north and west attached to the island, but the land now existing between the island and the left bank of the river in front of fractional Sec. 14 was formed by gradual accretion to the left bank.

Lots 1, 2, and 3, Sec. 65, T. 5 N., R. 9 E., containing 157.42 acres along a portion of the east side of the island were patented in 1841. No part of the area formed by accretion in the channel east of said tracts can be regarded as belonging to the said patented land because the added area was not formed by attachment to the said patented tracts but was built up by attachment to the left bank.

In the absence of a statute to the contrary, lands formed by accretion belong to the riparian or shore owner to which the accretion is attached (29 Cyc., 349).

The State of Mississippi was notified of this application and has made no objection. Furthermore, no statute of that State in conflict with the general rule has been found.

The United States, as owner of fractional Sec. 14, became vested with title to the land formed by accretion immediately in front thereof and attached thereto. The added area was not disposed of by the sale of fractional Sec. 14. At that time, the original survey had ceased to correctly represent the approximate shore line, which fact was well known to the Government and the purchaser, and it was not the intention to pass title to the area outside the meander line. See 46 L. D., 461. Therefore, the added area in question opposite fractional Sec. 14, is public land of the United States and it appears appropriate to cause the same to be surveyed for disposal under the public land laws. This should be accomplished by extending lines westward from the north and south extremities of fractional Sec. 14 in such manner as will not interfere with the rights of adjacent riparian owners to their proportionate interest in the accretion area. From an examination of the examiner's plat it appears that in running the side lines very little departure from cardinal directions will be necessary in order to equitably apportion the added area. As so extended, the north line will intersect the east side of the island as originally surveyed, while the south line will be extended westwardly until it intersects with a line extended south from the southeast corner of Sec. 68; being also the southeast corner of the island as originally surveyed.

It will be observed that survey of the said accretion area as above indicated will not encroach upon any part of the island as originally surveyed. This will respect the title to the patented portion of the island in conformity with the rule that reappearance of land after submergence restores title to the former owner where its

identity can be established by situation or boundary lines (29 Cyc., 352).

It is not believed advisable to survey the accretion areas on the north, west, and south of the island. All islands in the Mississippi River south of Cairo, Illinois, were withdrawn from all disposal in 1882 at the request of the Secretary of War in connection with the improvement of navigation. Therefore, the applications for survey of the areas formed by accretion to the island filed by Ackland H. Jones and others are rejected.

It is further noted that there are certain applications or entries pending for the unpatented tracts of the island as originally surveyed. It is directed that appropriate action be taken to clear the record of these claims because the lands were withdrawn and were not subject to entry.

The record is remanded for further appropriate action as indicated herein.

### MOFFAT TUNNEL COMMISSION.

*Opinion, April 4, 1924.*

#### RIGHT OF WAY—STATUTES.

The acts of Congress granting easements over the public lands are to be construed liberally and their spirit and intent effectuated, if possible, where the benefits to be derived therefrom are for the public interest.

#### RIGHT OF WAY—RAILROAD GRANT—TELEPHONE LINE.

Easements over the public lands may be granted under the various Federal Statutes appertaining thereto to a commission created and empowered by a State legislature for the purpose of acquiring a site and of constructing and maintaining a tunnel for the use of railroads, power, telegraph and telephone lines, transportation of water, and as a highway for vehicles, notwithstanding that the actual operation of these utilities is to be conducted by others, where their maintenance is for the public interest.

#### PRIOR DEPARTMENTAL DECISION OVERRULED.

Case of Minnesota and Ontario Bridge Company (30 L. D., 77), overruled.

#### WORK, *Secretary*:

I have before me the question as to whether the application filed in your office [Commissioner of the General Land Office] under the act of March 3, 1875 (18 Stat., 482), by the Moffat Tunnel Commission, the managing and controlling board of the Moffat tunnel improvement district, may be granted.

It appears that the commission in certificate on the map filed states "that the railroads using said tunnel are to be operated as common carriers of passengers and freight."

In addition to the right of way for the tunnel, application is also made for right of way over certain lands to be used as an approach

to the tunnel. Accompanying the application is a certified copy of an act passed by the General Assembly of the State of Colorado and approved May 12, 1922, entitled—

An act to provide for the creation of an improvement district to be called "The Moffat Tunnel Improvement District," for the construction of a tunnel through the Continental Divide between Grand County and Gilpin County, said tunnel to be used for transportation and other purposes; \* \* \*

Section 6 of the act provides:

It shall be the duty of the said board, on behalf of said district, to provide for the construction of and to construct a transportation tunnel, its equipment and approaches thereto; said tunnel to be constructed at an elevation of approximately nine thousand two hundred (9,200) feet above sea level, the eastern portal of said tunnel to be located at the most practicable site on the eastern slope of the Continental Divide and near the headwaters of South Boulder Creek, the western portal of said tunnel to be located at the most practicable point on the western slope of the Continental Divide, near the headwaters of the Frazier River. Said tunnel and its approaches shall be so constructed that the same may be used for standard gauge railroads, for the transmission of power and for the use of telephone and telegraph lines, for the transportation of water, and for the transportation of automobiles and other vehicles.

Paragraph (e) of section 8 of the act provides:

To acquire on behalf of said district a tunnel site and such other lands and approaches thereto as may be necessary, either by contract or by making application to the United States Government for easements or rights of way or other rights: *Provided*, That the acquiring of such right or easement shall not prejudice the right of any applicant to also apply to the United States Government for the right and easement to conduct water through or over the same land.

It appears from the foregoing that the purpose and intent of the Legislature of the State of Colorado was to create an instrumentality which should secure the rights of way for and thereafter construct a tunnel through the Continental Divide, primarily for use of railroads, and also for use by power lines, telephone and telegraph lines, for the transportation of water, and also as a highway for use by automobiles and other vehicles.

The act of March 3, 1875, *supra*, grants a right of way through the public lands of the United States to any railroad company duly organized for the construction, maintenance, and operation of a railroad or railroads. The grant is not an absolute one, in the sense that a fee title to the land is acquired. It is a grant of the right to use the land for the purposes described in the law. This act does not include or authorize the granting of rights of way for the other purposes mentioned in the act of the Legislature of the State of Colorado, but there are other acts of Congress granting rights of way, easements, or permits over the public lands for power

transmission lines, telegraph and telephone lines, ditches or other conduits for the transmission of water, etc.

The situation presented in this case is unusual. The backbone of the Rocky Mountain system, or the so-called Continental Divide, forms a barrier between eastern and western Colorado, which, at certain seasons of the year, is nearly, if not quite, impassible, and certainly renders the operation of a railroad or railroad lines at or near this point infeasible and unprofitable. It also renders difficult, if not impossible, the maintenance and operation over its high summit of power transmission lines and telegraph and telephone lines. It renders absolutely impossible, save by a tunnel as proposed, the transmission of water through a canal or conduit from one side of the divide to the other.

The act of 1875 and other acts authorizing the granting of rights of way and permits were not enacted with a condition like this specifically in view, but it can not be assumed that Congress intended that portions of the country separated by mountain barriers like this should be deprived of transportation and water lines. In fact, it is not questioned, I think, that a right of way might be applied for and secured which would involve a tunnel through the Continental Divide by a railroad company for the construction and operation of a railway line; nor that a duly authorized corporation or individual might not secure an easement which would involve the construction of a tunnel through the mountains for a canal or water conduit, or for power lines, telegraph or telephone lines. Such rights or easements are in the public interest, beneficial generally to the regions isolated by natural barriers, but generally beneficial to all. Therefore, the acts are to be liberally construed, and their spirit and intent effectuated, if possible.

This Department, in the case of Minnesota and Ontario Bridge Company (30 L. D., 77), held that the privileges granted by the act of March 3, 1875, *supra*, are limited to railroad companies organized as common carriers for the benefit of the general public. Hence, a company organized for the purpose of surveying, laying out, constructing, and operating a railroad bridge is not entitled to the privilege.

This decision has not controlled the Department in its administration of analogous right of way statutes. For instance, under the act of March 3, 1891 (26 Stat., 1095), which provides in language quite similar to that used in the railroad right of way act "that the right of way through the public lands and reservations of the United States is hereby granted to any canal or ditch company formed for the purpose of irrigation," the Department has never required the

company securing the right of way to itself engage in the irrigation of its own lands, but has granted rights of way to canal companies which may serve the public generally by disposing of water to others for irrigation.

In this matter, under the applicable statute of Colorado, it is the privilege and duty of the Moffat tunnel improvement district to secure the necessary easements or rights of way to provide for the construction of and to construct a tunnel to be used for railroad purposes, and for the other purposes specified in the act and heretofore described. While the district, after the construction of the tunnel, may not directly operate the railroad or railroad lines, or the power transmission lines, etc., it will be the holder of the easement or privilege which makes their operation possible. It will be the agency to construct the tunnel, on the floor of which the various public utilities will cross the divide. It will arrange for such use of the tunnel by contract, lease, or other appropriate instrument. Unless and until otherwise provided, it will be responsible for the maintenance and operation of the tunnel and indirectly, at least, for the operation of the utilities passing through same.

While no single Federal law provides for rights of way for all of the various uses proposed here to be made, there are separate Federal laws making provision for all of the uses proposed, and assuming that the applicant is qualified, I see no reason why, under the peculiar circumstances here presented, the map or grant may not be so amended as to approve it under each and all of the applicable acts of Congress. The desirability of the proposed tunnel is beyond argument, and its purposed construction and operation has been widely advertised, not only through the enactment of the legislature described but through the public press. So far as I am advised, no objection has been filed in or suggested to the Department. The granting of the right of way will not be harmful to the public interest, but will be highly beneficial. The purposes for which it is to be used are authorized by various acts of Congress, and the organization created by the Legislature of Colorado to accomplish the desired result seems to me to fall within the spirit and intent of the applicable laws.

You are therefore authorized to secure the amendment of the application and of the accompanying map or maps, so as to make appropriate reference to the several acts of Congress applicable to the different uses proposed, and to thereafter submit the application and maps to the Department for further consideration, with view to approval, in the absence of objection.

CASSIDY v. HALL (ON REHEARING).

Decided April 5, 1924.

See Page 165

PRACTICE—LAND DEPARTMENT—HEARING—FORFEITURE—STOCK-RAISING HOMESTEAD.

The Land Department will not declare a forfeiture of the rights of a claimant to public lands on technical grounds; and failure to adhere to a technical construction of the Rules of Practice will not deprive him of an opportunity to be heard unless it appears that he has no substantial claim to equitable consideration.

DEPARTMENTAL DECISION CITED AND APPLIED.

Case of Dawkins v. Hedin (44 L. D., 371), cited and applied. \*

FINNEY, *First Assistant Secretary*:

This is a motion by John P. Cassidy for rehearing of the departmental decision of February 25, 1924, in the above-entitled case, involving the stock-raising homestead entry of Steve Hall, San Francisco, 012997.

The facts in the case are fully and clearly set forth in the decision of the Commissioner of the General Land Office dated September 24, 1923, and in the decision now complained of which affirmed that of the Commissioner. No restatement of the facts is here necessary.

The Commissioner and the Department cited and followed the decision in the case of Dawkins v. Hedin (44 L. D., 371). It is now contended that said case is in no way parallel with the present case, for the reason that in the cited case the contestee made an attempt to file an answer within the legal time. It is further contended that there must be strict compliance with the Rules of Practice, and several cases are cited to show that the Department has required that Rule 8 of Practice be strictly complied with. 168 Pacific 257

Rule 8 of Practice has reference solely to the contestant, and in view of the reward that he is seeking, to the loss of the contestee, there is good reason for requiring that all technicalities be observed. On the other hand, it is not fair nor just that entrymen should be deprived of their lands on technical grounds. No decision where an entryman, or contestee, has thus been dealt with has been cited. 82625

Notwithstanding this contestant's attempted distinction, the Department considers the language in the case of Dawkins v. Hedin, *supra*, particularly applicable in the present case:

The Department does not feel inclined, however, to finally adjudicate the rights of an entryman solely upon technical considerations, especially a technical construction of the Rules of Practice. On the contrary, it is, and has always been, the policy of the Land Department to allow claimants of public land opportunity to be heard, notwithstanding they may have, through mistake, inad-

vertence, or even laches, clearly forfeited their right to a hearing under the Rules of Practice, unless it appears from the record, with reasonable clearness, that they have no substantial claims to equitable consideration.

If the contestee can prove the allegations made in his belated answer he has a good defense. It would manifestly be inequitable to deny him the right to be heard. On the other hand, the contestant must have considered himself prepared to prove his charges as made. No more will be required of him than he reasonably should have anticipated on initiating the contest.

The motion for rehearing is denied.

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### EXPIRATION OF PROSPECTING PERMITS—ACTS OF OCTOBER 2, 1917, AND FEBRUARY 25, 1920.

#### INSTRUCTIONS.

[Circular No. 926.]

DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE,  
*Washington, D. C., April 5, 1924.*

#### REGISTERS AND RECEIVERS,

##### UNITED STATES LAND OFFICES:

Action taken by certain district land offices on applications for lands which have been included in prospecting permits outstanding for more than two years, indicates that not all district land officials fully understand the status of such permits, and in order that the matter may be made clear, you are instructed as follows:

Permits to prospect for potash, under the act of October 2, 1917 (40 Stat., 297), Circular No. 594 (46 L. D., 323), permits to prospect for coal and permits to prospect for sodium, under the act of February 25, 1920 (41 Stat., 437), Circulars Nos. 679 and 699 (47 L. D., 489 and 529), are issued for terms of two years without provision for extensions of time. If any such permittee does not apply for patent or lease, based on claim of discovery within the two-year period, the permit expires by limitation fixed by both the law and the terms of the permit. No formal action to terminate the permit is necessary or will be taken. Accordingly, such a permit, after two years from date of issue, being no longer in force, is no bar to the allowance of other filings for the land which it embraced.

As to oil and gas prospecting permits, the situation is different. The law authorizes extensions of time beyond the two-year period, and an oil and gas prospecting permit is to be considered in force

until it has been canceled by this office and the cancellation noted on your tract books. (See 49 L. D., 171; also Circular No. 915, approved February 5, 1924, 50 L. D., 299.)

WILLIAM SPRY,  
*Commissioner.*

Approved:

E. C. FINNEY,  
*First Assistant Secretary.*

## EFFECT OF A TERRITORIAL STATUTE IMPOSING DUTIES UPON A FEDERAL OFFICER.

*Opinion, April 8, 1924.*

### OFFICERS—ALASKA—STATUTES.

A Territorial legislature does not possess the power to impose in any manner duties on a Federal officer, and, if such be attempted, he can not properly perform them unless they come within the scope of his duties as fixed by the Federal statutes.

### OFFICERS—SECRETARY OF THE INTERIOR—ALASKA—STATUTES.

In issuing instructions prescribing the duties of an officer of his department, pursuant to an act of Congress creating the office, the Secretary of the Interior may include duties fixed by a Territorial legislature, but in doing so he can not go beyond the intent and purpose of the Federal statute or require the performance of duties not contemplated by it.

### EDWARDS, *Solicitor*:

The concrete question presented for my consideration in this instance is as to whether or not an officer of the United States "can properly discharge the duties imposed on him by the acts of the Legislature" of the Territory of Alaska.

The statutes and facts which gave rise to this inquiry are as follows:

The act of March 3, 1891 (26 Stat., 1104), entitled "An act for the protection of the lives of miners in the Territories," created the office of mine inspector in each Territory where the annual output of its coal mines was in excess of 1,000 tons and prescribed certain methods of mining construction and operation conducive to the safety and health of the miners. That act fixed the compensation and duties of the inspectors, one of whom was appointed for and served in Alaska and compensated from specific appropriations made annually for that purpose. Recently, however, that office was, in effect, abolished by the failure of Congress to make an appropriation for its salary, and in lieu of an appropriation of that kind a lump sum has been annually appropriated—

For investigations and the dissemination of information with a view to improving conditions in the mining, quarrying, and metallurgical industries under

the Act of March 3, 1915, and to provide for the inspection of mines and the protection of the lives of miners in the Territory of Alaska, including personal service, equipment, supplies, and expenses of travel and subsistence.

See acts of May 24, 1922, and January 24, 1923 (42 Stat., 552, 588 and 1174, 1210).

In establishing the Bureau of Mines (36 Stat., 369; 37 Stat., 681; 39 Stat., 262, 303), Congress provided for the appointment, and prescribed the duties of a Director and an Assistant Director and stated that "there shall also be in said bureau experts and other employees, to be appointed by the Secretary of the Interior."

Under these statutes the Secretary created the position, among others, of supervising mining engineer for Alaska and charged him with certain duties.

By the act of May 3, 1917 (Laws of Alaska, 1917, Chapter 51), the Legislature of Alaska enacted a statute which created the office of Territorial mining inspector and at some length and in considerable detail prescribed methods for the construction and operation of mines, some of which were not included in the act of 1891, *supra*. In this Territorial act the duties and powers of the mining inspector were fully set out and paragraph "a" of its section 9 also provided that—

The Federal Mining Inspector or Inspectors shall have authority to enforce the provisions of this Act. In all such cases the Federal Mining Inspector shall report in detail to the Governor of the Territory of Alaska all cases wherein he has invoked the aid of the Territorial Mine Inspection Act.

Section 10 of that act declared that—

\* \* \* The Territorial Mine Inspector shall turn over a copy of the register to the Federal Mining Inspector, and shall at all times give said Federal Mining Inspector access to said register.

The appointment of a Territorial mining inspector was authorized by the act of May 7, 1921 (chapter 44, Laws of Alaska, 1921).

Under the provisions of section 19 of the act of 1891, *supra*, that act became inoperative as to Alaska upon the passage of the act of 1917, just mentioned, and the Federal officers were, therefore, no longer charged with any duties relative to the operation of mines other than such as arose from the act authorizing the appointment of a supervising mining engineer which made an appropriation for the purpose, among others, "to provide for the inspection of mines and the protection of the lives of miners in the Territory of Alaska."

In addition to the Territorial statutes mentioned there is the act of May 5, 1919 (chapter 59, Laws of Alaska, 1919), which established the office of labor commissioner of the Territory and provided that the Territorial mining inspector should, *ex officio*, perform the duties of that office which are—

(a) To assort, systematize and present in biennial report to the Governor of Alaska statistical details relating to all departments of labor in the Territory, especially in its relation to the industrial, social and sanitary conditions of the laboring classes, and to the permanent prosperity of the industries of the Territory.

(b) He shall have the power to enforce all sanitary and safety regulations, as are hereinafter set forth.

(c) He may inspect any factory, cannery or other establishment where labor is employed, and is hereby empowered and authorized so to do.

By the act of May 3, 1923 (chapter 82, Laws of Alaska, 1923), the Legislature of Alaska suspended the provision of its former act which created the office of mining inspector and declared as follows:

SECTION 2. That the Governor be, and he is hereby, authorized and empowered on behalf of the Territory to enter into a cooperative arrangement with the Department of the Interior whereby and under which there shall be joint Territorial and Federal supervision and inspection of mines and mining other than coal mines and mining in Alaska under the direction of the late Territorial mine inspector, now supervising mining engineer of the Bureau of Mines, who shall serve without pay from the Territory.

SECTION 4. That during the biennium the said supervising mining engineer of the Bureau of Mines shall serve without compensation as labor commissioner and, as heretofore in his capacity of Territorial mine inspector, dutifully carry out the provisions of the law (chapter 59, 1919) creating the said office of labor commissioner: *Provided further*, That he shall compile statistics showing the loss of wages due to injuries according to employments and the amounts paid injured employees or claimants in settlement of the employer's liability.

In furtherance of the objects of this later statute an agreement was entered into on June 1, 1923, by the Governor of Alaska, as party of the second part, with the Director of the Bureau of Mines acting on behalf of the United States, as party of the first part, in which, among other things, it was stipulated that—

The party of the first part agrees to appoint and pay the salary of a supervising mining engineer who will have charge of the Bureau of Mines work in Alaska, which includes the duty of Federal mine inspector, and the representative of the Secretary of the Interior under the Act of February 25, 1920, commonly known as the Oil Leasing Act, and in addition thereto shall also act and serve as Territorial mine inspector, in accordance with the terms of chapters 82 and 96, Session Laws of Alaska, 1923.

The passage of the Territorial act of 1923 and the entering into this agreement was evidently the result of a desire to avoid the effect of an opinion rendered by my predecessor, Solicitor Booth, on September 15, 1921, in which he held that a person occupying the position of surgeon in the Federal Public Health Service could not be appointed as Territorial commissioner of health for the reason that section 11 of the act of August 24, 1912 (37 Stat., 512, 516), the act organizing the Territory, declared (Sec. 11)—

That no member of the legislature shall hold or be appointed to any office which has been created, or the salary or emoluments of which have been increased, while he was a member, during the term for which he was elected and for one year after the expiration of such term; and no person holding a commission or appointment under the United States shall be a member of the legislature or shall hold any office under the government of said Territory.

It appears that the supervising mining engineer for Alaska is now holding three offices, one under the Federal Government and two under the Territorial government, or he is at least charged with the performance of the duties of all these offices.

The only theories on which it may be urged that the supervising mining engineer can legally perform the duties of the two Territorial offices mentioned are (1) that the Legislature of Alaska had the power to transfer those duties to him; and (2) that the Secretary of the Interior could legally direct him to perform those duties.

It is hardly necessary to make an argument or cite authorities to show that the legislature of a Territory does not possess the power to in any manner impose duties on a Federal officer because it is a fundamental fact that an officer can not be charged with the performance of duties or clothed with powers by any other than the Government by which his office was created.

Inasmuch as the act under which the supervising mining engineer was appointed contemplates and sanctions Federal inspections of mines and the regulation of mines for the promotion of safe and sanitary conditions the Secretary of the Interior undoubtedly has the power to issue regulations to that end, and may require their enforcement by or through the supervising mining engineer or other representative of the Bureau of Mines. And in doing so he may possibly require the doing of some of the things which come within the prescribed duties of the Territorial mining inspector but the duties thus imposed on the supervising mining engineer result from the Federal, and not from the Territorial statutes.

In the issuance of such regulations the Secretary is empowered, controlled and limited by the statute on which the regulations are based, and he can not legally go beyond the intent and purpose of those statutes and authorize or require the doing of things not contemplated by them. From this it necessarily follows that the supervising mining engineer can not be legally required to perform any acts in relation to mines which are required by the Territorial laws of its mining inspector if such acts do not come within the Federal statutes; and the Secretary certainly can not require him to do any of the things prescribed as the duties of the Territorial labor commissioner. To require the supervising mining engineer to do things not contemplated by the Federal statutes would be to violate the statute which forbids the expenditure of public moneys in the payment of

salaries or compensation for the performance of acts not authorized by Congress.

In conclusion I have the honor to inform you that in my opinion the statutes of Alaska which undertake to impose duties on or empower the supervising mining engineer or any other Federal officer to perform acts of any kind are entirely without force and effect, and such officers can not properly do the things enjoined by such statutes unless they come within the scope of their duties as fixed by the Federal statutes.

Approved:

E. C. FINNEY,

*First Assistant Secretary.*

50740400

5124622

See 5124267

512438

*Distinguished,*  
*l. W. 459* PACE v. CARSTARPHEN ET AL.

*Decided April 9, 1924.*

**OIL AND GAS LANDS—PROSPECTING PERMIT—LEASE—SURFACE RIGHTS.**

The only disposition that may be made of the surface pursuant to section 29 of the act of February 25, 1920, of lands for which a prospecting permit or lease has been awarded, is such disposal, under existing nonmineral land laws, as will preserve to the permittee or lessee free use of the surface in any manner necessary to meet the fullest compliance with the terms of the permit or lease.

**OIL AND GAS LANDS—PROSPECTING PERMIT—LEASE—SURFACE RIGHTS—RESERVATION—IMPROVEMENTS—DAMAGES—WAIVER—STATUTES.**

The free use of the surface accorded by section 29 of the act of February 25, 1920, to a permittee or lessee, is included in the right to prospect for, mine and remove the mineral deposits reserved by the act of July 17, 1914, in lands subsequently entered pursuant to the latter act, and the waiver of compensation required of such entryman is not an alteration or enlargement of the terms of the act of 1914, inasmuch as the only provision in that act requiring reimbursement to an entryman for damage to his crops and improvements, is that contained in section 2 thereof, which relates to nonmineral claims antedating the initiation of mineral rights.

**OIL AND GAS LANDS—PROSPECTING PERMIT—SURFACE RIGHTS—IMPROVEMENTS—DAMAGES—WAIVER.**

The practice of requiring an express waiver of claim to compensation for damage to crops and improvements by one who has been permitted to make a surface entry pursuant to section 29 of the act of February 25, 1920, is merely an administrative means of fully informing the entryman as to the extent of his rights under that section.

**OIL AND GAS LANDS—WITHDRAWAL—SURFACE RIGHTS—SETTLEMENT—HOMESTEAD ENTRY—RELATION.**

When a valid settlement precedes a withdrawal, classification or report that the lands are of mineral character, an entry, predicated upon such claim, afterwards allowed pursuant to the act of July 17, 1914, relates back to the date of settlement and the rights of the entryman under the homestead laws are to be determined accordingly.

## OIL AND GAS LANDS—PROSPECTING PERMIT—ADVERSE CLAIM—SETTLEMENT.

Where a permit has been applied for or issued under the leasing act, and the land has not been withdrawn or classified as valuable for oil or gas deposits, a conflict between the permittee and a nonmineral entryman who settled upon the land prior to the initiation of the permit will be adjudicated pursuant to section 12(c) of the oil and gas regulations, and the entryman will be afforded an opportunity to prove that the lands are non-mineral in character.

## DEPARTMENTAL DECISIONS CITED, DISTINGUISHED AND APPLIED.

Case of William R. Brennan (48 L. D., 108), cited and distinguished; case of Alfred O. Lende (49 L. D., 305), cited and applied.

FINNEY, *First Assistant Secretary*:

On April 30, 1923, Ezra Lee Pace filed homestead application, pursuant to section 2289, Revised Statutes, for lot 5, Sec. 2, lots 5 and 9, Sec. 3, T. 7 N., R. 86 W., and lot 10, Sec. 34, T. 8 N., R. 86 W., 6th P. M., Glenwood Springs, Colorado, land district. He claimed a preference right of entry by virtue of settlement on the land, alleged to have been made and maintained since the fall of the year 1914. Improvements of the value of \$500, including a log house, log barn, log granary, and a fence around the entire tract, were claimed, in addition to the cultivation of 30 acres of the land.

As to earlier claims to the land, it appears that these townships were suspended for resurvey on January 30, 1913, and the suspension revoked December 6, 1922, effective upon the filing of plats of resurvey. Plats of the land involved were filed in the local office on January 30, 1923. An earlier application to enter the land, filed on March 12, 1923, was rejected because the land described was not designated in accordance with the resurvey. The application filed by Pace on April 30, 1923, was an amendment of the earlier filing.

On August 2, 1920, W. P. Carstarphen and C. C. Irwin filed an application, pursuant to section 13 of the leasing act of February 25, 1920 (41 Stat., 437), for a permit to prospect for oil and gas on lands which included what is shown by the resurvey to be lot 5, Sec. 2, T. 7 N., R. 86 W.

Application for a similar permit was filed by William B. Hartley, on January 28, 1921, for land shown by the resurvey to include lots 5 and 9, Sec. 3, T. 7 N., R. 86 W.

On April 14, 1921, Pace filed an application for a permit for the land settled upon by him, claiming a preference right to a prospecting permit pursuant to section 20 of the leasing act. The Commissioner, by decision dated October 27, 1921, held that, as Pace had no entry for the land of record, he was not entitled to a preference right to a permit, and rejected his application in its entirety because of conflict with the prior applications by Hartley and by Carstarphen and Irwin. Permits were issued on November 23, 1921, and

September 30, 1922, respectively, to these applicants. No evidence of compliance with the drilling requirements of these permits is of record, nor have they been granted extension of time pursuant to the act of January 11, 1922 (42 Stat., 356).

By decision dated September 11, 1923, the Commissioner held the homestead application by Pace for rejection unless he should file consent to a reservation of the oil and gas deposits in the land to the United States pursuant to the act of July 17, 1914 (38 Stat., 509), and unless he consented to the allowance of said entry subject to the rights of the prior mineral claimants to use so much of the surface of the land in their permits as may be necessary in the prospecting for, mining and removing of the mineral deposits without compensation therefor to him, in accordance with section 29 of the leasing act, *supra*.

Pace has appealed from this decision, claiming that he should not be required to consent to a reservation under the act of July 17, 1914, *supra*, until the land has been withdrawn or classified as valuable for oil and gas deposits and he has been afforded the privilege guaranteed in said act of showing, at a hearing, that the land has no such value. He also denies the authority of the Department to hold his claim subordinate to those of the permittees and require him to consent to the uses prescribed in accordance with section 29 of the leasing act, *supra*. He claims a right to an unrestricted patent.

In the case of William R. Brennan (48 L. D., 108), the Department held that lands embraced in a prospecting permit must be treated as valuable for oil and gas, although not within a designated oil or gas field; and applications to make homestead entries filed subsequent to the permit application must be made with a reservation of the oil and gas deposits under the act of July 17, 1914, *supra*, and subject to the permittee's full right to develop the land without hindrance or liability to the entryman. Such also is the provision made in departmental instructions of October 6, 1920 (47 L. D., 474). This requirement is in the exercise of the discretionary power granted the Secretary in section 29 of the leasing act which is—

That said Secretary, in his discretion, in making any lease under this Act, may reserve to the United States the right to lease, sell, or otherwise dispose of the surface of the lands embraced within such lease under existing law or laws hereafter enacted, in so far as said surface is not necessary for use of the lessee in extracting and removing the deposits therein.

The only disposition which may be made of the surface of lands under lease, or under a prospecting permit which gives a right to a lease, is such disposal, under existing nonmineral land laws, as will preserve to the lessee, or permittee, free use of the surface in any manner necessary to the fullest compliance with his lease or permit.

Such rights are reserved by the act of July 17, 1914, *supra*, in the expressed reservation of the right to prospect for, mine and remove the reserved deposits. The waiver of compensation required is not an alteration or enlargement of the terms of the said act, as the only provisions requiring reimbursement of an entryman for damage to his crops and improvements appear in section 2 of said act, and clearly relate to entrymen whose claims antedate the initiation of a right to prospect for minerals and to preexisting mineral entries.

The practice of requiring an express waiver of claim to compensation for damage to the crops and improvements by a subsequent entryman is merely an administrative means of fully informing such entryman of the extent of his rights under said entry if it is allowed as authorized by section 29 of the leasing act.

There remains the question whether this appellant acquired any rights by his settlement on the land long prior to the filing of the permit applications, which made his subsequent entry subject to different conditions in determining his rights to mineral deposits in the land than it would have been without such settlement.

Where settlement is made by a qualified person upon public lands which are subject to settlement, the settler acquires a right as against other claimants to make an entry for said land under the homestead laws which can only be defeated by the application to make entry by one who has made an adverse settlement. Such adverse claim can not become effective until the preference-right period for making entry prescribed by the public land laws has expired. When an entry is allowed upon the application of a settler, all rights acquired under said entry relate back to the time of settlement. Alfred O. Lende (49 L. D., 305).

By the act of July 17, 1914, *supra*, the Government was authorized to require a mineral waiver of persons who should thereafter "locate, select, enter, or purchase" under the nonmineral land laws of the United States any lands which are *subsequently* withdrawn, classified or reported as valuable for deposits of oil, gas or other minerals named in said act. A right to disprove the alleged mineral character of the lands in this status is preserved by said act.

No provision is made with respect to settlement claims. However, it seems clear that, once entry is made by the settler, based upon a valid settlement, his rights with respect to a withdrawal are the same as those of an entryman. Otherwise the provisions of the act of June 25, 1910 (36 Stat., 847), which defined and limited the authority of the Government to withdraw lands for classification and other public purposes, would entitle the settler to proceed to an unrestricted patent without regard for a subsequent withdrawal.

That such was not the intent of the Congress in the act of July 17, 1914, *supra*, appears when it is considered that, under the said act of June 25, 1910, subsisting entries and valid settlements occupied the same status, and no reason appears why the later act should, or was intended to, impose greater burdens upon entrymen than upon settlers. The same need for a reservation of mineral deposits to the United States existed in each case.

The Department holds, therefore, that when a valid settlement precedes a withdrawal, classification or report that lands are valuable for the minerals specified in the act of July 17, 1914, *supra*, and the settler initiates a valid entry based upon such settlement, the settler is thereafter to be regarded as an entryman as from the date of settlement, and his rights under the homestead laws will be determined accordingly.

Where, as in this case, permits have been applied for or issued under the leasing act, and the lands have not been withdrawn or classified as valuable for deposits of oil or gas, the conflict will be adjudicated pursuant to section 12(c) of the leasing regulations, and the entryman afforded an opportunity to prove that the lands are nonmineral in character, in accordance with the regulations of March 20, 1915 (44 L. D., 32).

In a report dated February 15, 1924, the Director of the Geological Survey classified the land, pursuant to section 12(c) of the departmental regulations, *supra*, as having no prospective oil and gas value, stating:

This land is in Routt County, Colorado, about 8 miles north of Milner on the Denver and Salt Lake Railroad. It is in an area which was examined in the course of a reconnaissance investigation for coal by the Geological Survey in 1906, and in the course of a rather detailed investigation of oil and gas possibilities by the Colorado Geological Survey in 1919, the results of the latter investigation being published in 1920 in Bulletin No. 23 of the Colorado Geological Survey.

The conclusion expressed in my letter of February 2, is based in part on the report of the Colorado Geological Survey which shows that the land listed is situated far down on the east flank of the Chimney Creek dome near the trough of the parallel southwestward trending syncline which limits that structure on the east and well outside the area of closure on that structure, and in part on the failure of an adequate test of that dome drilled by the Plateau Oil Company in 1921 to disclose the presence of oil or gas in paying quantities. Although showings of oil and gas were reported to have been encountered in this well in the lower part of the Mancos shale on the crest of the dome, the underlying Dakota sandstone, which has recently been found to be productive of oil on Hamilton dome 45 miles to the southwest, was found to be barren of oil or gas and the field was abandoned. Inasmuch as the favorable structural conditions provided by the dome have been shown to be incompetent to effect the accumulation of oil or gas in paying quantities, there appears no geological

warrant for asserting that adjacent land unaffected by favorable structure offers reasonable promise of containing valuable deposits of those minerals.

In view of the fact that it has no evidence of drilling operations by the permittees which would tend to show the existence of deposits of oil or gas, the Department must rely upon this report, and holds that the appellant's entry may be allowed without a mineral reservation unless within 15 days from notice the permittees furnish evidence sufficient to warrant a classification of the land as prospectively valuable for oil or gas deposits. In the absence of such a showing and evidence of compliance with the drilling requirements of the permits or of facts warranting extensions of time, these permits will be canceled.

The Commissioner's decision is modified to conform to the views herein expressed and the records returned for the action herein directed.

### CONRAD LAND AND WATER COMPANY.

*Decided April 12, 1924.*

#### DESERT LAND—COAL LAND—BURDEN OF PROOF—EVIDENCE—CONFIRMATION—ACT OF JANUARY 27, 1922.

An application, based upon a canceled desert land entry for 320 acres, to make an exchange of entry under the act of January 27, 1922, for public land classified as coal land, must be controlled by the act of June 22, 1910, which limits the area of classified coal land that may be acquired under the desert land laws to 160 acres with reservation of the coal deposits, unless the applicant assumes the burden of proof and shows that the land is noncoal in character.

#### DESERT LAND—ACT OF JANUARY 27, 1922.

An exchange of entry under the act of January 27, 1922, for 160 acres, based upon a canceled desert land entry for 320 acres, exhausts the right of the entryman to make a further exchange under the provisions of that act.

#### FINNEY, *First Assistant Secretary*:

At the Great Falls, Montana, land office on December 26, 1902, final certificate issued to Edgar E. Brownson under his desert-land entry embracing lot 4, SE.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , Sec. 30, E.  $\frac{1}{2}$  NW.  $\frac{1}{4}$ , W.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , NE.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , and NW.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , Sec. 31, T. 30 N., R. 4 W., M. M. (316.52 acres). The entry and final certificate were canceled June 26, 1908, under proceedings instituted by the General Land Office on November 20, 1906. The land was transferred by entryman and his wife on January 5, 1903, to the Conrad Investment Company, a Montana corporation, now the Conrad Land and Water Company.

On March 22, 1923, said corporation filed in the Cheyenne, Wyoming, land office an application (033397) to change the entry and

transfer the payments made thereunder to N.  $\frac{1}{2}$ , Sec. 24, T. 25 N., R. 80 W., 6th P. M. (320 acres), under the provisions of section 2372, Revised Statutes, as amended by the act of January 27, 1922 (42 Stat., 359). The Commissioner of the General Land Office has submitted the application to the Department, pursuant to paragraph 5 of the regulations of March 22, 1922, Circular No. 817 (48 L. D., 595).

According to an abstract of title furnished by the applicant, the relinquishment recorded January 16, 1924, described the NW.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , instead of the NW  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , said Sec. 31.

The tract applied for has been classified as coal land. The act of June 22, 1910 (36 Stat., 583), provides that lands which have been withdrawn or classified as coal lands or are valuable for such deposits may, if desert in character, be entered under the desert-land law, provided such entry is made with a view to obtaining title with a reservation to the United States of the coal in such lands and of the right to prospect for, mine, and remove the same, but no desert-land entry under the provisions of the act shall contain more than 160 acres.

As an application to make desert-land entry for the 320 acres involved would necessarily be rejected, it follows that the application in question, which is in effect an application to amend a desert-land entry, can not be allowed, although it clearly appears that the applicant is entitled to the benefits of the act of January 27, 1922, *supra*. However, the application may be allowed as to 160 acres of the land applied for, provided applicant files an amendment of the application to state that it is made subject to the provisions and reservations of the act of June 22, 1910, *supra*, and also records a relinquishment as to NW.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , said Sec. 31, and files proof that the same has been recorded; but by availing itself of the opportunity to acquire 160 acres of the land, the applicant will exhaust its right under the act of January 27, 1922, *supra*, based on the desert-land entry of said Brownson.

Unless applicant, within 30 days from notice, proceeds in accordance with the foregoing, or applies for a hearing to disprove the classification of the land applied for, making the showing required by paragraph 5 of the regulations of September 8, 1910 (39 L. D., 179), the application will stand rejected.

## OREGON AND CALIFORNIA RAILROAD AND COOS BAY WAGON ROAD GRANT LANDS—SALE OF TIMBER.

### INSTRUCTIONS.

[Circular No. 928.]

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

*Washington, D. C., April 14, 1924.*

REGISTERS AND RECEIVERS,

LAKEVIEW, PORTLAND, AND ROSEBURG, OREGON:

Under the provisions of the acts of June 9, 1916 (39 Stat., 218), and February 26, 1919 (40 Stat., 1179), certain lands, formerly within the Oregon & California Railroad and Coos Bay Wagon Road grants, revested in the United States. Section 2 of the act of June 9, 1916, provides for the classification of all lands revested thereunder into three classes, to wit: First, power-site lands; second, timber lands; and third, agricultural lands. Section 4 of said act reads in part as follows:

The timber on lands of class two shall be sold for cash by the Secretary of the Interior, in cooperation with the Secretary of Agriculture, or otherwise, to citizens of the United States, associations of such citizens, and corporations organized under the laws of the United States, or any State, Territory, or District thereof, at such times, in such quantities, and under such plan of public competitive bidding as in the judgment of the Secretary of the Interior may produce the best results: *Provided*, That said Secretary shall have the right to reject any bid where he has reason to believe that the price offered is inadequate, and may reoffer the timber until a satisfactory bid is received: *Provided further*, That upon application of a qualified purchaser that any legal subdivision shall be separately offered for sale such subdivision shall be separately offered before being included in any offer of a larger unit, if such application be filed within ninety days prior to such offer: *And Provided further*, That said timber shall be sold as rapidly as reasonable prices can be secured therefor in a normal market.

The Secretary of the Interior shall as soon as the purchase price is fully paid by any person purchasing under the provisions of this section issue to such purchaser a patent conveying the timber and expressly reserving the land to the United States. The timber thus purchased may be cut and removed by the purchaser, his heirs or assigns, within such period as may be fixed by the Secretary of the Interior, which period shall be designated in the patent; all rights under said patent shall cease and terminate at the expiration of said period: *Provided*, That in the event the timber is removed prior to the expiration of said period the Secretary of the Interior shall make due announcement thereof, whereupon all rights under the patent shall cease.

No timber shall be removed until the issuance of patent therefor. All timber sold under this act shall be subject to the taxing power of the States apart from the land as soon as patents are issued as provided for herein.

Section 3 of the act of February 26, 1919, provides that all lands revested thereunder shall be classified and disposed of in the manner

provided by the act of June 9, 1916, for the classification and disposition of the Oregon & California Railroad grant lands. The act of June 4, 1920 (41 Stat., 758), authorizes the sale of timber on power-site lands. Pursuant to the provisions contained in said acts, the following instructions are issued to govern timber sales made hereafter on lands revested under the acts of June 9, 1916, and February 26, 1919:

1. Prospective purchasers of timber on Oregon & California Railroad or Coos Bay Wagon Road grants should file application to purchase with the Assistant Supervisor of Surveys, 611 Post Office Building, Portland, Oregon, who will forward them to the Commissioner of the General Land Office, Washington, D. C., with his recommendations. Application blanks and information with respect to the quality and quantity of timber on any given tract, and the appraised price, may be obtained from the assistant supervisor of surveys on request.

2. Timber sales will be authorized in the General Land Office by one letter addressed to the Secretary of the Interior, in which all the facts appertaining to the proposed sale will be stated, accompanied by another letter, for the approval of the Department, addressed to the register and receiver of the local land office where the sale is to be held, giving the names of the applicants and such other facts as may be deemed appropriate, together with authorizations to the newspapers for the publication of the notice prepared and submitted therewith for that purpose. Publication will then be made for 30 days consecutively, if daily papers are designated, or five times consecutively, if weekly papers are designated, in at least three newspapers of general circulation in the State of Oregon, one of which shall be in the county wherein the land is situated, of the notice announcing the intention to offer at public sale, on a day and at an hour specified, at the district land office where the land is located, the timber described in the notice furnished for publication; the cruiser's estimate of the timber on each 40-acre tract, appraised value thereof, and the terms of sale, to form a part of such notice.

3. The sale will be at public auction or outcry at the district land office of the district within which the land is situated, and conducted by the register of such office.

4. The right of purchase at such sale will be limited, in accordance with the acts, to citizens of the United States, associations of such citizens, and corporations organized under the laws of the United States, or any State, Territory, or District thereof. Native-born citizens should file an affidavit to that effect with the register when making the first purchase, and naturalized citizens and cor-

porations will be required to furnish either the original certificates or duly certified or attested copies of the certificates of naturalization or incorporation, respectively.

5. The register, before offering any portion of the timber advertised, shall advise all intending purchasers that the patent for the timber purchased will contain a clause fixing the period within which said timber must be cut and removed by the purchaser, his heirs or assigns, at ten years; and that no timber shall be removed until the issuance of a patent therefor. He should also, before the sale, inquire whether any person present desires the timber on any legal subdivision advertised to be separately offered, before its inclusion in any offer of a larger unit, and if such request is made, the land thus designated may be so offered.

6. No timber shall be sold for less than the appraised price; and any bid may be rejected by the Secretary of the Interior, if it is by him deemed inadequate.

7. The timber shall be sold to the highest bidder, subject to the approval of the Secretary of the Interior, and the entire purchase price bid paid on the date of sale to the receiver in cash, currency, or certified checks, when drawn in the manner authorized, who will issue his receipt therefor and hold the same as other "unearned moneys," until notified of the approval of the sale, when it shall be applied to the credit of the "Oregon and California Land Grant Fund," if for timber sold on Oregon & California Railroad land, or "The Coos Bay Wagon Road Grant Fund," if for timber sold on the Coos Bay Wagon Road grant. After issuance of the receipt the register will issue a cash certificate for the timber sold. Such certificate should give the name and preferably the address of the purchaser, proper description of the land including the area involved according to the plat of survey, serial and receipt numbers, amount of purchase money, and commissions paid, the act under which the land revested, and also, in case the land is embraced in a power-site withdrawal, the act of June 4, 1920 (41 Stat., 758).

8. Persons who purchase timber at such sale shall be required to pay, in addition to the purchase price, a commission of one-fifth of 1 per centum thereof to be placed to the credit of the fund to which the purchase money is credited.

9. On the termination of the sale the register will forthwith transmit to the General Land Office, by special letter, the cash certificate described in section 7 hereof, and a report in duplicate of the proceedings under the sale, showing (1) the land on which the timber was sold; (2) the names of the purchasers; and (3) the amounts received therefor, together with such other details as may seem properly appropriate thereto. As soon as the sale has been approved by the

Department, the General Land Office will advise you of that fact, and the patent will then be issued and transmitted in the usual way.

10. The receiver of public moneys will, in addition to his regular abstracts, render monthly, for each county, in case of timber sales therein, a separate abstract, in duplicate, Form 4-103, reporting thereon the date of the application of the money, the receipt and serial numbers, the name of the purchaser, together with a description of the land involved, and the amount of purchase money, using more than one line, when necessary, for each item. Commissions should be shown on this abstract on a separate line. Notation showing the county in which the land is situated should also be made upon the receipt and papers pertaining to the sale.

11. The laws of the State of Oregon, particularly the provisions of section 8962 of the Oregon Code, with respect to the burning of slashing, are applicable to the cutting of all timber purchased under these regulations.

12. Circulars of September 15, 1917 (46 L. D., 447), and September 26, 1919 (47 L. D., 381), are superseded hereby.

WILLIAM SPRY,  
*Commissioner.*

Approved:

E. C. FINNEY,  
*First Assistant Secretary.*

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### DORSEY L. ROUSE.

*Decided April 14, 1924.*

REPAYMENT—RECLAMATION HOMESTEAD—WATER RIGHT—APPLICATION—OIL AND GAS LANDS—NOTICE—SURFACE RIGHTS—WITHDRAWAL.

An applicant who has been granted a water right in connection with a reclamation homestead application for land within a petroleum reserve is entitled, upon withdrawal of the application rather than accept a surface patent, to repayment of the water charges, where he had no knowledge of the petroleum withdrawal and the public notice pursuant to which he made payment failed to state that any of the land was within a reserve.

DEPARTMENTAL DECISION CITED AND APPLIED.

Case of Thomas A. Sheppard (46 L. D., 251), cited and applied.

FINNEY, *First Assistant Secretary:*

On July 19, 1921, the Department issued a public notice stating that, upon proper water-right application being made therefor, water would be furnished under the Shoshone irrigation project, in the irrigation season of 1922, and thereafter, for the irrigable areas shown on the farm unit plats of T. 58 N., R. 97 W., 6th P. M., and

other townships, which plats were approved on the date of said notice.

Pursuant to said public notice, Dorsey L. Rouse, on September 16, 1921, filed in the office of the project manager a water-right application for the irrigable area in lot 2 (known as farm unit "D"), Sec. 30, said township, and at the same time deposited \$177.65, being the initial payment on the water-right charges. The project manager, on September 22, 1921, issued the certificate provided for by the public notice, which Rouse filed in the Lander, Wyoming, land office with his application to make homestead entry for said farm unit.

The tract being within the limits of a petroleum reserve created by Executive order of December 6, 1915, the local officers rejected the homestead application because not made subject to the provisions and reservations of the act of July 17, 1914 (38 Stat., 509), as to oil and gas, and applicant was advised of his right to consent to the amendment of his application. He took no action, and his application to make entry was finally rejected.

Rouse thereafter applied to the project manager of the Shoshone irrigation project for the return of the \$177.65 deposited when he filed the water-right application. The project manager advised Rouse under date of January 27, 1922, that the money could not be returned. The Commissioner of Reclamation, acting on an informal appeal, has submitted the matter to the Department.

The regulations under which Rouse's application for water right was filed were embodied in the public notice of July 19, 1921, which failed to state that any of the land was in a petroleum reserve or that homestead entries for the land must be made subject to the provisions and reservations of the act of July 17, 1914, *supra*, as to oil and gas.

The paragraph (6) of the public notice which the project manager referred to in denying the application for repayment provides, in part, as follows:

No part of a payment made will be returned to a successful applicant in any case if he is a qualified homestead entryman.

Paragraph 7 of the public notice provides:

Failure of applicant to obtain land applied for.—Where any applicant fails to obtain public land applied for by him, he will be permitted to elect whether he will amend his application to embrace other land not affected by pending applications and otherwise subject thereto when such amended application is presented, or withdraw his original application without prejudice. In the event of such withdrawal the water-right charges deposited will be returned by the project manager upon surrender of the receipt therefor.

Rouse alleges that he was not advised in any way that the tract he applied for was withdrawn as valuable for oil and gas.

It is well established that the refusal of an entryman to accept a lesser estate (a surface patent) than he undertook to acquire, and the relinquishment of the entry, is not a voluntary abandonment, and the purchase money paid may be recovered under the repayment laws. See Thomas A. Sheppard (46 L. D., 251) and cases there cited.

Rouse was not a "successful applicant" within the meaning of paragraph 6 of the public notice heretofore quoted. He failed to obtain the land applied for; hence the matter is governed by the quoted paragraph 7 of the public notice.

The ruling of the project manager is reversed, and the Commissioner of Reclamation will prepare the claim for certification.

### ARTHUR SAVARD.

*Opinion, April 14, 1924.*

#### SURVEY—LAKE—LAND DEPARTMENT—JURISDICTION.

The Land Department, after it has disposed of the adjacent surveyed lands, has no jurisdiction to survey, as omitted areas, small tracts of lands outside the meander line of the original surveys about the margins of lakes and streams, which were narrow strips or shifting sand bars, towheads, or other unsubstantial areas, considered of little value at the time of survey.

#### COURT DECISION CITED AND APPLIED.

Case of United States *v. Lane et al.* (260 U. S., 662), cited and applied.

*First Assistant Secretary Finney to Hon. Robert B. Howell, United States Senate:*

I refer to your recent personal call, when you left me a letter, with inclosures, received by you from Mr. Arthur Savard, of Omaha, Nebraska, relative to his application for the survey of an alleged unsurveyed island in the North Platte River and alleged land between the meander and shore lines of the river.

Among the papers forwarded by Mr. Savard is a carbon copy of the recommendation of the Commissioner of the General Land Office in the matter, dated March 30, 1923, which was approved by the Department on April 3, 1923.

Since the latter date, the Department, by decision of August 17, 1923, denied a petition for the exercise of supervisory authority filed on behalf of Mr. Savard, and by decision of September 19, 1923, denied a petition for reconsideration.

For your convenience, I will briefly review the record.

Mr. Savard contends that there is a strip of unsurveyed mainland along the left bank of the North Platte River in Secs. 13, 14, and 15,

T. 17 N., R. 45 W., 6th P. M., together with a group of unsurveyed islands in front thereof.

Said township was surveyed by a deputy surveyor in August, 1875. According to the field notes, the distances across the river were ascertained by chaining. It must therefore be concluded that the survey was not made during high water. No islands, either surveyed or unsurveyed, were reported within the township, and but for the statement that "the bottom along the river from 20 to 80 chains wide is level," the conditions adjacent to the meander line are without description in the field notes.

After Mr. Savard's application for survey was filed, a field investigation was made by an engineer connected with our surveying service. The engineer reported that the original meander line as run by the deputy surveyor is in fair agreement with the left bank of the river with one notable exception, namely, on the line between Secs. 14 and 15, where the point for the original meander corner was found to be about 7.20 chains north of the bank of a small channel from 40 to 50 links wide and 6 inches deep, and about 19 chains north of the left bank of the main channel of the river. The area between the small and main channels was reported to be made up of a group of islands that exist as such only during high water. At other times they are attached to and form a part of the mainland through the drying up of the small channel. The examining engineer expressed the opinion that the deputy surveyor's meanders were in acceptably close agreement with the actual bank of the river.

I am of opinion that a new field investigation would not develop any material facts not already known and contained in the record. While a new investigation might show a slight error in the figures reported by the engineer referred to above, the same question would be presented for determination, viz: Is the discrepancy the result of gross error or fraud such as would warrant the United States in asserting a claim to the land?

In the decision of August 17, 1923, heretofore referred to, the Department stated that examination of the numerous Supreme Court decisions in cases involving the question of the jurisdiction of this Department to survey as omitted areas lands left outside the meander line of the original surveys about the margin of lakes and streams will disclose variations in conclusions reached, dependent upon the facts peculiar in each case, and that if any definite or clear rule can be formulated in respect to such cases it is that where the omitted areas are comparatively large and substantial, so as to indicate gross error or fraud in the original survey, then this Department is justified in taking cognizance of the omitted areas as unsurveyed land; but if, on the contrary, the areas are small, or were narrow strips,

or shifting sandbars, towheads, or other unsubstantial areas, considered of little or no value at the time of the original survey, then this Department has no right to assume jurisdiction after disposal of the adjacent surveyed areas.

In the area under consideration, the Department is confronted on the one hand by Mr. Savard's application for survey, in which he insists that the omitted area is sufficient to justify survey, and on the other hand by the objections of the riparian owners on the ground that the omitted area is too small to warrant its recognition as public land.

In a recent decision by the Supreme Court of the United States (*United States v. Lane, et al.*, 260 U. S., 662), it was held that the Department was not warranted in taking cognizance, for purposes of survey and disposal, of an omitted area about the margin of a lake where the area formed a compact body of 97.44 acres and was about 4,000 feet in length with a width at its widest point of 1,200 feet. Guided by the decision cited, rendered January 22, 1923, the Department is constrained to adhere to its former decisions on Mr. Savard's application, and to treat the matter as finally closed.

### CARLIN v. CASSRIEL.

*Decided April 21, 1924.*

OIL AND GAS LANDS—PROSPECTING PERMIT—LEASE—SURFACE RIGHTS—SECRETARY OF THE INTERIOR—SUPERVISORY AUTHORITY.

The authority conferred upon the Secretary of the Interior by section 29 of the act of February 25, 1920, to permit the allowance of surface entries of lands included in prospecting permits and leases is discretionary with that officer.

OIL AND GAS LANDS—PROSPECTING PERMIT—LEASE—SURFACE RIGHTS—STOCK-RAISING HOMESTEAD.

Section 29 of the act of February 25, 1920, provides that only such surface as is not necessary for the use of a permittee or lessee may be disposed of, and, where a stock-raising homestead entry has been allowed pursuant to that section, the right vested in the permittee or lessee to use so much of the surface as may be necessary to conduct operations under the permit or lease is paramount to the right of the entryman to use such surface.

OIL AND GAS LANDS—PROSPECTING PERMITS—SURFACE RIGHTS—STOCK-RAISING HOMESTEAD—IMPROVEMENTS—DAMAGES.

Section 29 of the act of February 25, 1920, modifies that portion of section 9 of the stock-raising homestead act which requires compensation for damage to the crops and improvements of the entryman resultant from the prospecting for the reserved mineral deposits, as to stock-raising homestead entries allowed pursuant to the former section.

FINNEY, *First Assistant Secretary*:

This is an appeal by James J. Carlin from the decision of the Commissioner of the General Land Office dated December 14, 1923, which sustained the protest of Henry H. Cassriel against the allowance of his application, filed on May 11, 1923, to make entry, under the stock-raising homestead act of December 29, 1916 (39 Stat., 862), for Sec. 8, T. 19 S., R. 15 E., M. D. M., Visalia, California, land district, and held that the entire surface of said lands was necessary for the present and proposed prospecting operations of the protestant, under his permit issued to him, pursuant to section 13 of the leasing act of February 25, 1920 (41 Stat., 437), on November 22, 1921.

The principal ground for protest advanced by the permittee is that the drilling and development work intended to be carried on upon Sec. 8 will require full use of all the water available thereon and in the immediate vicinity. It is shown that his assignee, the Progressive Oil Company, which is doing the drilling upon this permit, encountered a substantial flow of oil in a shallow sand in a well drilled in May, 1923, on Sec. 20, T. 19 S., R. 15 E., also covered by this permit, and has been granted an extension of time until November 22, 1924, within which to complete said well to a depth of at least 2,000 feet.

This appellant claims that his application should be allowed because, in March, 1923, he initiated a contest against the stock-raising entry of Johnnie Valencia, made on March 24, 1917, for the land involved, and, after securing the contestee's relinquishment, which he filed with his application, proceeded, without complaint from the permittee, to construct a dwelling, sheep barn and corral, constructed a pipe line for water from a source off this land, and hauled posts and wire for the fencing of said land, under the belief that the allowance of his entry would be a mere matter of course. He disclaims all intention of using the waters which flow from springs and wells on the land, for the reason that said waters are mineralized and are not potable.

It does not appear that, in making his application, this appellant paid the cancellation fee required of successful contestants; and he would not, therefore, be entitled to any priorities as a contestant. Assuming that he had such status, his application to enter the land covered by the subsisting permit could only be allowed in the discretion of the Secretary, pursuant to section 29 of the leasing act, and with full rights with respect to the use of the surface of the land reserved to the United States and its licensees and permittees.

Section 29 of the leasing act provides as follows:

That said Secretary, in his discretion, in making any lease under this Act, may reserve to the United States the right to lease, sell, or otherwise dispose of the surface of the lands embraced within such lease under existing law or laws hereafter enacted, in so far as said surface is not necessary for use of the lessee in extracting and removing the deposits therein: \* \* \*.

Section 11 of the permit issued to Henry H. Cassriel reserves a right to allow surface entries in the following words:

The granting of this permit shall not preclude the allowance of entry, location, or selection of any of the lands included therein, where such entry, selection, or location is made with a reservation of the mineral deposits to the United States.

The stock-raising homestead act of December 29, 1916, *supra*, expressly reserves to the United States the mineral deposits in lands designated thereunder, and further reserves, in respect thereto, a right in the United States or its lessees or licensees to *prospect for*, mine, and remove the reserved deposits. The provision of the statute on this point is as follows:

SEC. 9. That all entries made and patents issued under the provisions of this Act shall be subject to and contain a reservation to the United States of all the coal and other minerals in the lands so entered and patented, together with the right to prospect for, mine, and remove the same. The coal and other mineral deposits in such lands shall be subject to disposal by the United States in accordance with the provisions of the coal and mineral land laws in force at the time of such disposal. Any person qualified to locate and enter the coal or other mineral deposits, or having the right to mine and remove the same under the laws of the United States, shall have the right at all times to enter upon the lands entered or patented, as provided by this Act, for the purpose of prospecting for coal or other mineral therein, provided he shall not injure, damage, or destroy the permanent improvements of the entryman or patentee, and shall be liable to and shall compensate the entryman or patentee for all damages to the crops on such lands by reason of such prospecting.

From the foregoing provisions, the following facts are clear: First, the Government has reserved the right to dispose of the surface of the lands under permit, in so far as they are not necessary to the permittee in carrying out the terms of his permit. Second, that the stock-raising homestead act is "an existing law" authorizing surface entries, within the meaning of section 29 of the leasing act; and entries, if allowed thereunder, reserve, by the expressed provision of said act, the right of the permittee to use so much of the surface as is reasonably necessary in *prospecting for*, mining, and removing the reserved deposits. As section 29 of the leasing act provides that only such surface as is not necessary for the use of a lessee (or a permittee) may be disposed of, it is clear that the provision of the stock-raising homestead act requiring compensation for damage to crops and improvements is inconsistent with the right already vested

in the permittee to use so much of the surface as is necessary, and that said act is to that extent modified by the leasing act. Third, that the allowance of this surface entry is discretionary with the Department.

Upon the evidence before it, the Department finds that this appellant was not warranted in assuming that his entry would be allowed and made his expenditures at his own risk. There remains only a determination whether, in the exercise of the discretion vested in it, the Department should allow this entry. The permittee, who, it appears, allowed the appellant to go into possession of the land without protest, has claimed that the allowance of this entry will endanger the water supply contemplated as necessary to operations upon the land, and suggests, but does not show that the allowance of a stock-raising homestead entry to this appellant would result in vexatious controversies. This appellant has secured a source of water from outside the land; and, in view of his expenditures, which, although improvidently made, were suffered to be made without prompt protest by the permittee, the Department is of the opinion that his entry may be allowed. It takes occasion to point out at this time, however, that, under the law, the rights of the permittee are paramount as to the water originating on the land and the surface thereof, and that appellant's entry will be canceled for any infringement thereof or any hindrance of the permittee in the reasonable use of the land in connection with his operations.

The Commissioner's decision is, therefore, modified to permit appellant to elect, within 30 days from notice, to make his entry subject to the foregoing conditions, failing in which his application to enter will be finally rejected.

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### RAVEN OIL AND REFINING COMPANY

*Decided April 22, 1924.*

#### OIL AND GAS LANDS—PROSPECTING PERMIT—LEASE.

The action of the Land Department in granting an oil and gas prospecting permit under section 13 of the act of February 25, 1920, is, in effect, an adjudication that the land is of a status and character subject to prospecting thereunder, and it can not thereafter deny a lease under section 14 of that act to the permittee where he has in good faith proceeded, in reliance on the permit, to discovery and production of oil and gas.

*FINNEY, First Assistant Secretary:*

January 3, 1924, the Raven Oil and Refining Company, a corporation, filed application 019912 for an oil and gas lease under the provisions of section 14 of the act of February 25, 1920 (41 Stat., 437), covering W.  $\frac{1}{2}$  E.  $\frac{1}{2}$ , Sec. 30, and W.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , Sec. 31, T. 2 N., R. 102 W., 6th P. M., Glenwood Springs, land district, Colorado,

basing said application on the discovery of oil within the limits of the above-described area, as the result of drilling operations performed in the fulfillment of the requirements of a section 13 oil and gas prospecting permit granted the company on April 13, 1922, on application filed September 1, 1920.

By letter of April 9, 1924, the Commissioner submits the lease application, without recommendation, for departmental consideration, reciting matters called to his attention in a report dated February 27, 1924, by the Director of the Bureau of Mines, in view of which matters the Director recommends that the application be rejected on the ground that the land involved is not subject to a section 14 lease.

The action of the Department in granting the permit based upon the recommendation of the United States Geological Survey, constituted, in effect, an adjudication that the land in question was of a status and character subject to permit under section 13 of the act and to lease under section 14. The company has, in apparent good faith, proceeded, in reliance on the permit, to develop oil on the land, expending substantial sums in the drilling of four wells to depths ranging from 577 to 600 feet, three of which produced a total yield of 57 barrels of oil a day, the fourth being nonproductive.

In view of all the circumstances of the case the Department believes that it would be clearly inequitable to deny the company a section 14 lease of the land which it now seeks. Indeed the Department does not believe it has the legal right to deny a lease, under the circumstances disclosed. In the absence of further objection, therefore, such a lease will be granted the applicant, and, pursuant to the company's designation, the same will provide for a 5 per cent royalty in amount or value of the oil produced from the W.  $\frac{1}{2}$  SE.  $\frac{1}{4}$ , Sec. 30, and W.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , Sec. 31, with a sliding scale royalty effective as to the W.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , Sec. 30.

## RECORDS—NOTATION OF CANCELLATION OF OIL AND GAS PERMITS.

### INSTRUCTIONS.

[Circular No. 929.]

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

*Washington, D. C., April 23, 1924.*

REGISTERS AND RECEIVERS,

UNITED STATES LAND OFFICES:

Owing to the many complaints of the operation of the present rule as to the noting of the cancellation of the oil and gas permits on

the tract books of your offices in order that other applications may be received for the same land and in the interest of good administration and equal rights to all the following administrative rule is adopted:

Hereafter the cancellation of an oil and gas permit will be made effective on a certain date (probably 20 days from the date of the letter of this office taking such action) when the cancellation will be noted on the tract books of the local land office at 10 o'clock a. m. Applications for the land may be filed personally or by mail between the hours of 9 a. m., and 10 a. m. of the day cancellation becomes effective, and all applications so filed will be treated as having been filed at 10 a. m., and in case of conflict will be disposed of by a drawing held publicly by you at 2 p. m. on the same day.

Letters of this office canceling the oil and gas permits will name the date when cancellation becomes effective and will state the hour when applications may be filed as indicated in the preceding paragraph.

A carbon copy of such letter should immediately upon its receipt be posted in your office as notice to the public. The drawing should be conducted in such a manner that no valid criticism can or may be made as to its fairness.

Circular No. 915, dated February 5, 1924 (50 L. D., 299), is accordingly modified as to oil and gas prospecting permits.

WILLIAM SPRY,  
*Commissioner.*

Approved:

E. C. FINNEY,  
*First Assistant Secretary.*

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### ARBUCKLE RESERVOIR COMPANY.

*Opinion, April 23, 1924.*

RIGHT OF WAY—CANALS, DITCHES AND RESERVOIRS—POWER SITES—WATER  
RIGHT—RECLAMATION—RESERVATION.

The inhibition in the act of March 3, 1921, against the granting thereafter of any permit or other authorization for reservoirs or other works for the storage or carriage of water within the limits of any national park or national monument without specific authority of Congress, is applicable to such works for irrigation purposes as well as for power purposes, and precludes the granting of an extension of a right of way over such lands for an irrigation reservoir constructed pursuant to the act of March 3, 1891.

EDWARDS, *Solicitor:*

There has been referred to me for an opinion the inquiry by the National Park Service, contained in its letter of October 26, 1923,

in respect to the rights of the Arbuckle Reservoir Company in the Rocky Mountain National Park, Colorado, under its application for extension of its right of way for an irrigation reservoir.

It appears that application for right of way for a reservoir located on the S.  $\frac{1}{2}$  SE.  $\frac{1}{4}$ , Sec. 27, T. 3 N., R. 74 W., was approved February 26, 1904, under the act of March 3, 1891 (26 Stat., 1095). At that time the land was not in a national park. The approval was for a reservoir to cover an area of 17.6 acres, with a dam 18 feet high.

December 12, 1914, the company filed application to extend its right of way for enlargement of the reservoir. This application was rejected by the Department July 27, 1915, for the reason that the lands involved were then included in the Rocky Mountain National Park, which was established by the act of January 26, 1915 (38 Stat., 798).

September 27, 1923, the company again filed application for extension of its right of way to include enlargement of the original reservoir so as to cover 24.6 acres, with a dam 57 feet high. This application was rejected by the Commissioner of the General Land Office by letter of October 22, 1923. It was held that the terms of the special act creating the park were controlling, and inasmuch as that act made no provision for allowance of rights of way under the act of March 3, 1891, *supra*, no such application could be allowed affecting lands within the park. Reference is further made to the act of February 15, 1901 (31 Stat., 790), which was expressly mentioned in the act creating the park as applicable therein whenever consistent with the primary purposes of the park. The act of 1901 authorizes the issuance of revocable permits only and not irrevocable easements for the purposes therein specified, among others for irrigation structures such as dams, reservoirs, canals, etc.

The National Park Service takes the position that since the passage of the act of March 3, 1921 (41 Stat., 1353), no permit or easement for the use of right of way for reservoirs, canals, etc., may be granted affecting lands in a national park or a national monument without specific authority of Congress. That act reads as follows:

That hereafter no permit, license, lease, or authorization for dams, conduits, reservoirs, power houses, transmission lines, or other works for storage or carriage of water, or for the development, transmission, or utilization of power, within the limits as now constituted of any national park or national monument shall be granted or made without specific authority of Congress, and so much of the Act of Congress approved June 10, 1920, entitled "An Act to create a Federal Power Commission; to provide for the improvement of navigation; the development of water power; the use of the public lands in relation thereto; and to repeal section 18 of the River and Harbor Appropriation Act, approved August 8, 1917, and for other purposes," approved June 10, 1920, as authorizes licensing such uses of existing national parks and national monuments by the Federal Power Commission is hereby repealed.

The language of this law is comprehensive and absolute. It expressly prohibits the granting thereafter of any permit or other authorization for reservoirs or other works for storage or carriage of water within the limits of any national park or national monument without specific authority of Congress. The inhibition applies to such works for irrigation purposes as well as for power purposes. That such is the letter of the law can not be questioned, and the safeguard thus provided is just as appropriate in the one case as in the other. If a storage reservoir or a canal be regarded as objectionable and inconsistent with the purpose of the reservation when such structures are intended for use in connection with power development, it is difficult to see wherein they would be unobjectionable if intended for irrigation.

I see no such doubt or ambiguity in the language employed in the act as to justify resort to other aids for construction. The statute is plain and decisive and affords its own interpretation.

You are accordingly advised that in my opinion this Department has no authority to grant permit for extension of the right of way in question.

Approved:

E. C. FINNEY

*First Assistant Secretary.*

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JOHN W. MARQUARDT.

*Decided April 23, 1924.*

ATTORNEY—AGENT—ASSIGNMENT—ALIENATION — PATENT — SELECTION — ACT OF  
JANUARY 27, 1922.

An irrevocable power of attorney to make a change of entry under the act of January 27, 1922, whereunder the agent is authorized to make a selection and to transfer the land after the issuance of patent, constitutes an assignment of the right or claim, and is in violation of the second proviso to that act, but selections may be made by an agent acting under an ordinary power of attorney.

COURT DECISION CITED AND DISTINGUISHED.

Case of *Midway Company v. Eaton* (183 U. S., 602), cited and distinguished.

FINNEY, *First Assistant Secretary*:

Under date of March 17, 1924, you [attorney for Marquardt] were advised that it would be necessary, among other things, for John W. Marquardt, in connection with his application (Marquette 05086) under the act of January 27, 1922 (42 Stat., 359), to file his affidavit as to whether he has assigned or transferred his right or claim under said act, and whether the application now presented is for his sole use and benefit.

In your response of the 19th instant you state that you would advise Marquardt that it would be proper, "under the facts as hereinafter set out in his case," for him to furnish the affidavit required, were it not for the recent holding of the Department in a letter addressed to Mr. Joseph V. Pitts, of Ava, Missouri. You state—

Mr. Marquardt has executed and delivered to me, as his representative, a power of attorney to convey the lands selected under his application now pending, which contains a clause stating that for value received it is made irrevocable. This instrument is now in my hands, with the understanding that after patent has been issued for the land applied for it is to be used for the purpose of conveying the title to the land to a third party who desires to purchase it, the purchase money being deposited with me at the present time to be turned over to Mr. Marquardt when patent shall have issued and the power of attorney is executed. I have not purchased Mr. Marquardt's right under this act, and my connection with the matter is that of his representative in securing patent to the land for him and disposing of his title thereto thereafter to the intending purchaser.

The ruling to which you refer was brought about by the submission by Mr. Pitts of an unsigned affidavit under the act of January 27, 1922, *supra*, and an unsigned power of attorney giving an unnamed agent power of attorney to locate and sell such land as may be selected thereunder, the power of attorney stating that—

for value received, the receipt whereof is hereby acknowledged, this power of attorney is hereby made and declared to be irrevocable by me or otherwise.

The Department, by letter of March 3, 1924, held that the granting of the proposed power of attorney, for a valuable consideration, would constitute an assignment of the claim or right, and would warrant the Department in rejecting the application.

The Department does not question the right of persons who may be entitled to the benefits of the act of January 27, 1922, *supra*, to appoint an agent to locate a tract of "surveyed public land, non-mineral in character, free from lawful claim, and otherwise subject to general disposition," and to thereafter insert the description thereof in an application executed by the beneficiary or by the attorney in fact. After such an application is filed, the Department is not concerned with what disposition the applicant may make of the lands. But it will not knowingly approve an application where the applicant has transferred his right or claim by an *irrevocable* power of attorney such as was exhibited by Mr. Pitts. The applicant must be in position to make the affidavit required in the departmental letter of March 17, 1924. Such holding is not in conflict with the ruling of the Supreme Court of the United States in *Midway Company v. Eaton* (183 U. S., 602), cited by you, for the reason that the agent who located the Sioux half-breed scrip was acting under an ordinary power of attorney.

In adjudicating applications under the act of January 27, 1922, *supra*, the Department will be governed by the rule affirmed by the court in the case cited; but where an application is filed under an *irrevocable* power of attorney it will be held that the right or claim has been thereby transferred.

Mr. Marquardt will be allowed until June 1 next to file the required affidavit.

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### JAMES A. POWER ET AL.

*Decided April 23, 1924.*

#### RECLAMATION HOMESTEAD—SURVEY—RIGHT OF WAY—RAILROAD LAND—PURCHASE—PAYMENT.

Where a farm unit which has been surveyed without segregation of a railroad right of way contains lands on both sides thereof, disposition of such unit under the reclamation homestead act will be made in accordance with the survey without any deduction from the purchase price as to diminution in area caused by the right of way, but the water charges will be based on the irrigable area only.

#### RECLAMATION HOMESTEAD—SURVEY—RIGHT OF WAY—RAILROAD LAND—PURCHASE.

In the establishment of farm units in a reclamation project upon lands crossed by a railroad right of way, the units are generally confined to one side of the right of way, and no part thereof is included in the survey pursuant to which the lands are disposed of under the reclamation homestead act, but such rule is not invariable and may be modified to meet engineering or irrigation conditions.

#### DEPARTMENTAL DECISION CITED AND DISTINGUISHED.

Case of Clinton C. Reed (45 L. D., 646), cited and distinguished.

#### FINNEY, *First Assistant Secretary*:

By letter of April 11, 1924, the Commissioner of the General Land Office submitted for consideration by the Department certain questions involved in the survey and disposal of lands covered by railroad rights of way on the public domain generally, and particularly in respect to a number of entries in the Huntley Irrigation Project, Montana, crossed by the line of the Northern Pacific Railway Company.

It appears that farm units in that project were as a general rule segregated from the right of way of the Northern Pacific Railway Company but in some instances the farm unit crossed and included the right of way. A typical case of the latter is that of farm unit "D" in sections 9 and 16, T. 3 N., R. 31 E., containing 174.42 acres. In fixing this farm unit, the subdivisions made by the regular public land survey were adopted and followed, being lot 4, W.  $\frac{1}{2}$  SW.  $\frac{1}{4}$ , Sec.

9, and NW.  $\frac{1}{4}$  NW.  $\frac{1}{4}$ , Sec. 10, said township. This tract is slightly more than one mile in length and is one-fourth of a mile in width. It is crossed by the railway line near its center, the distance covered being a little more than one-fourth of a mile.

This tract was entered by James A. Power as a homestead entry May 28, 1918, under the provisions of the reclamation act of June 17, 1902 (32 Stat., 388). The land was formerly within the Crow Indian Reservation and it was ceded and opened to entry at the purchase price of \$4 per acre. The entryman has submitted final proof as to residence and cultivation but has not paid the purchase price, and the specific question involved in respect to this particular entry is whether the entryman shall be required to pay for the whole area included in the farm unit, or whether there shall be a deduction in proportion to the area covered by the right of way, an area of 12 or 13 acres.

In the case of Clinton C. Reed (45 L. D., 646), the Department expressed the view that farm units should not be established across the railway right of way. In that case the unit was originally established so as to extend to but not to encroach upon the right of way. The land was entered under that survey but after the entry was made a supplemental plat was prepared whereby the unit was extended to the middle of the right of way and thereby added about 13 acres to the entry, which the entryman was called upon to pay for. The Department held that this could not be required, because it violated the rights of the entryman.

The objectionable plat in that case was prepared for the sole purpose of adding the right of way area to the unit theretofore entered under the prior survey which excluded the right of way. That case differs from the one now under consideration. The decision in the Reed case also called attention to the cases of Northern Pacific Railroad Company *v.* Townsend (190 U. S., 267) and E. A. Crandall (43 L. D., 556). Those cases considered the character of title acquired by the railroad company in and to the land covered by its right of way and conditions resulting from abandonment of the use of the land for the purposes of the grant. It was held that the grant was of a limited fee, made on an implied condition of reverter in the event that the company ceased to use or retain the land for the purpose for which it was granted; that the lands forming the right of way were taken out of the category of public lands and that the Land Department was without authority to convey rights therein; that a homesteader acquired no interest in the land within the right of way because of the fact that the entry was for the full legal subdivision crossed by the right of way.

The rule was succinctly stated in the syllabus of the Crandall case as follows:

Entry and patent of a legal subdivision crossed by the 400-foot right of way granted to the Northern Pacific Railway Company by the act of July 2, 1864, carries no interest or title to the right-of-way strip; and upon subsequent abandonment of the right of way the title thereto reverts to the United States and does not pass to the owners of the subdivisions through which the right of way runs.

This unsatisfactory condition was changed by the act of Congress approved March 8, 1922 (42 Stat., 414), which provides—

That whenever public lands of the United States have been or may be granted to any railroad company for use as a right of way for its railroad or as sites for railroad structures of any kind, and use and occupancy of said lands for such purposes has ceased or shall hereafter cease, whether by forfeiture or by abandonment by said railroad company declared or decreed by a court of competent jurisdiction or by Act of Congress, then and thereupon all right, title, interest, and estate of the United States in said lands shall, except such part thereof as may be embraced in a public highway legally established within one year after the date of said decree or forfeiture or abandonment be transferred to and vested in any person, firm, or corporation, assigns, or successors in title and interest to whom or to which title of the United States may have been or may be granted, conveying or purporting to convey the whole of the legal subdivision or subdivisions traversed or occupied by such railroad or railroad structures of any kind as aforesaid, except lands within a municipality the title to which, upon forfeiture or abandonment, as herein provided, shall vest in such municipality, and this by virtue of the patent thereto and without the necessity of any other or further conveyance or assurance of any kind or nature whatsoever: *Provided*, That this Act shall not affect conveyances made by any railroad company of portions of its right of way if such conveyance be among those which have been or may hereafter and before such forfeiture or abandonment be validated and confirmed by any Act of Congress; nor shall this Act affect any public highway now on said right of way: *Provided further*, That the transfer of such lands shall be subject to and contain reservations in favor of the United States of all oil, gas, and other minerals in the land so transferred and conveyed, with the right to prospect for, mine, and remove same.

It has been the usual practice in the survey and disposal of public lands to ignore such rights of way when extending surveys over the public domain under the rectangular system and dividing the lands into townships, sections, and smaller legal subdivisions. Such surveys have not as a rule been made to close on the right of way but have included the right of way in the area of the subdivision crossed, and disposals have been made upon the basis of the area shown by the survey without making deduction for the area covered by the right of way. This has been regarded as the most practicable method for general application on the broad expanses of the public domain in order to adhere to as closely as possible and retain the bene-

fits of the rectangular system. The legal difficulties arising from that practice in respect to titles in case of abandonment of the right of way have been solved by the act above quoted, and there is now even greater reason for its continuance.

However, this need not be regarded as an inviolable rule subject to no departure. The act referred to does not mandatorily require that patent be issued to include the land covered by such right of way in disposing of the remaining land adjacent thereto. This may be and ordinarily should be done, but if the exigencies of establishment of a subdivision lead the survey merely to the border of the right of way and not beyond it, there would appear no sound reason for extending the survey to embrace the right of way for the sole purpose of including it in the patent when disposing of the subdivision. This latter condition would be apt to exist particularly in the establishment of farm units in a reclamation project. Such units usually require special surveys often departing radically from the regular public land surveys, and are formed with special reference to the distribution of water and the size of the parcel allowable to one claimant, wholly without reference to the ordinary smallest legal subdivision contemplated in the rectangular system. From the standpoint of practical use, as stated in the Reed case, the units are advisedly confined to one side of the right of way in most instances. Where this is done, no part of the right of way should be included in the unit. But in the present case the unit is rather larger than usual, extending more than a mile in length, embraces the right of way and contains lands on either side thereof. Inasmuch as this unit was so established, presumably in accord with the best judgment of the engineer and administrative officers of the Government, it is deemed appropriate and in harmony with the law to dispose of the said subdivision according to the survey. The purchase price should apply to the full area without diminution for the area covered by the right of way, the water charges, of course, being based on the irrigable area only.

The record is remanded for action in this and other similar cases in harmony with the views herein expressed.

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### MONSON v. SAWYER.

*Decided April 26, 1924.*

#### OIL AND GAS LANDS—PROSPECTING PERMIT—APPLICATION—PRACTICE.

The provision in section 4 of the oil and gas regulations of March 11, 1920, relating to the thirty day suspension in local offices of permit applications to await the presentation of preference right claims before transmittal to

the General Land Office, applies only to applications for lands subject to disposal under the leasing act, but an application for prospecting land covered by an uncanceled permit, or otherwise segregated, should be rejected at once by the local officers, subject to the right of appeal, and transmitted in due course to the Commissioner of the General Land Office.

DEPARTMENTAL DECISION CITED AND APPLIED.

Case of Martin Judge (49 L. D., 171), cited and applied.

FINNEY, *First Assistant Secretary*:

On March 20, 1923, there was filed in the land office at Salt Lake City, Utah, a relinquishment of a permit to prospect for oil and gas, theretofore granted, under section 13 of the leasing act of February 25, 1920 (41 Stat., 437), to N. E. Seamount, for all of Secs. 5, 6, and 7, T. 20 S., R. 14 E., S. L. M.; and there was also filed, by John A. Monson, an application for a similar permit for this land. The relinquishment was noted on the serial register only, and was forwarded to the Commissioner of the General Land Office for acceptance, pursuant to departmental instructions of May 5, 1922 (49 L. D., 104); and Monson's application was suspended for a period of 30 days, evidently in order to comply with section 4 of departmental regulations under the leasing act, approved March 11, 1920 (47 L. D., 437).

The Commissioner, on April 4, 1923, accepted the relinquishment of the outstanding permit, which acceptance appears to have been received by the local officers and noted on their records on April 9, 1923. On April 15, 1923, the local officers forwarded Monson's application, and reported no conflicts therewith.

On May 31, 1923, Clara A. Sawyer filed an application for a similar permit for all of the land described, and pointed out that at the time Monson filed his application the lands were not subject to appropriation, because segregated on the records of the local office by the then uncanceled permit.

By decision dated February 5, 1924, the Commissioner rejected Monson's application, citing as authority therefor the ruling of the Department in the case of Martin Judge (49 L. D., 171) that—

until an outstanding permit is canceled by the Commissioner and the notation of the cancellation made in the local office, no other person will be permitted to gain any right to a permit for the same class of deposits by the filing of an application therefor, or by the posting of notice of intention to apply for such a permit.

Monson has appealed from said decision, alleging that his failure to reassert his application after the notation of the cancellation of the outstanding permit was solely occasioned by the fact that there was not, at that time, any protest or claim adverse to his application.

He claims that his application attached upon the restoration of the lands upon the records of the local office.

The reason given by appellant for not asserting a claim at the proper time is not one which moves the Department to find any equities in him which warrant it in recognizing his application to the exclusion of the one filed by the appellee. Appellant confesses knowledge that the land did not become subject to application for permit until the cancellation of the permit was noted on the tract book by the local officers. With this knowledge, he is chargeable with further knowledge that adverse applications could be properly initiated after such notation without any previous protest or claim adverse to his filing, which was admittedly invalid. The mere fact that he assumed from the absence of such protest or adverse claim, at the time the land became subject to permit, that no one else was interested in said land, does not excuse his failure to use reasonable diligence in asserting a proper claim.

In extending to permits under the leasing act, in the case of Martin Judge, *supra*, the rule stated in the case of California and Oregon Land Company v. Hulen and Hunnicutt (46 L. D., 55) as to the segregative effect of entries, selections, reservations, or patents, the Department, in effect, also extended to applications for prospecting permits the practice observed with respect to applications to make entries for such lands prior to their restoration. That practice has been to require the local officers, upon receipt of such an application, to reject it, subject to the right of appeal, because of the segregation of the land by the uncanceled entry, selection, reservation, or patent. The local officers were in error in following the instructions in section 4 of the regulations of March 11, 1920, *supra*, as those regulations relate only to applications filed for lands subject to disposal under the leasing act. In case an application for permit is filed for lands segregated by any permit, patent, selection, reservation, or otherwise, the local officers should reject such application at once, subject to the right of appeal within 15 days, and transmit such application in due course with report of the action taken.

As this appellant has admitted knowledge that his application was not valid at the time the lands were restored by the notation of the cancellation of the permit, the fact that his application was not rejected by the local officers in accordance with the practice before indicated is immaterial.

Upon the facts presented, it appears that this appellant's application was properly rejected. The Commissioner's decision is affirmed, and the case is closed.

ACCEPTABLE EXPENDITURES ON DESERT-LAND ENTRIES—SECTION 18, CIRCULAR NO. 474, AMENDED.

INSTRUCTIONS.

[Circular No. 933.]

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

*Washington, D. C., April 26, 1924.*

REGISTERS AND RECEIVERS,

UNITED STATES LAND OFFICES:

Section 18 of Circular No. 474 (45 L. D., 345, 357), in relation to acceptable expenditures for the reclamation of desert lands, is hereby amended by adding thereto the following paragraphs:

The value to be attached to and the credit to be given for, an expenditure for works or improvements is the reasonable value of the work done, or improvement placed upon the land, according to the market price therefor, or for similar work or improvements, prevailing in the vicinity, and not the amount alleged by a claimant to have been expended, nor the mere proof of expenditures, as exhibited by checks or other vouchers (*Bradley v. Vasold*, 36 L. D., 106).

Expenditures for the clearing of the land will not receive credit in cases where the vegetation or brush claimed to have been cleared away has not been actually removed by the roots. Therefore, expenditures for clearing, where as a matter of fact there has been only crushing, or rolling, or what is known in some localities as "railing" the land, will not be accepted.

You will give all possible publicity to this amendment of the regulations, and in examining annual proofs, and also final proofs in cases where final proofs have been submitted without the prior submission of annual proofs, you will carefully scrutinize such proofs with a view to determining whether the value of expenditures claimed is in accord with the true value of the work done or expenditures made, and also whether the clearing claimed to have been performed conforms to the requirements of the second paragraph of the amended regulations.

WILLIAM SPRY,  
*Commissioner.*

Approved:

E. C. FINNEY,

*First Assistant Secretary.*

## NORTHERN PACIFIC RAILROAD GRANT LANDS—SUSPENSION OF PATENTS.

### INSTRUCTIONS.

[Circular No. 931.]

DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE,  
*Washington, D. C., April 28, 1924.*

REGISTERS AND RECEIVERS,

UNITED STATES LAND OFFICES,

IDAHO, MINNESOTA, MONTANA, NORTH DAKOTA, OREGON,  
WASHINGTON, WISCONSIN, WYOMING:

By joint resolutions, Senate No. 82 and House Nos. 183 and 237, it is provided, among other things, that no patent shall issue to the Northern Pacific Railroad, now Railway, Company under the acts of July 2, 1864 (13 Stat., 365), and May 31, 1870 (16 Stat., 378), granting land to the said company, or under acts supplemental thereto or connected therewith (H. J. Res. 237)—

until after Congress shall have made a full and complete inquiry into the said land grants and acts supplemental thereto for the purpose of considering legislation to meet the respective rights of the Northern Pacific Railroad Company and its successors and the United States in the premises.

Under departmental instructions of April 19, 1924, in connection with the above resolutions, it is directed that you receive all applications by the company to list or select land, when such applications are regular in all respects, assign serial numbers thereto, note them on your records as applications, and forward them to this office *without action*. Fees tendered with such applications should be carried as unearned until further advised. However, when necessary to reject an application wholly or in part, for any reason, you will proceed as heretofore, but will not, in any case, allow and approve any application by the company, original or supplemental, until further advised.

All applications by parties not claiming or asserting a right under or through the company, apparently conflicting with a claim, or claims, by or through the company, will be received and acted on as heretofore.

WILLIAM SPRY,  
*Commissioner.*

Approved:

E. C. FINNEY,

*First Assistant Secretary.*

# RIGHTS OF SETTLERS TO OIL AND GAS DEPOSITS UNDER THE ACT OF FEBRUARY 25, 1920.

## INSTRUCTIONS.

[Circular No. 932.]

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

*Washington, D. C., April 28, 1924.*

REGISTERS AND RECEIVERS,

UNITED STATES LAND OFFICES:

In a recent decision unreported, the Department held that a settler upon the public domain prior to the passage of the leasing act, where the lands involved were not, at time of settlement, withdrawn or classified as valuable for oil and gas deposits, is entitled, under certain conditions, to a preference right to a permit to prospect for oil and gas, pursuant to section 20 of the leasing act, for the lands settled upon.

The following statements and regulations are hereby made to govern future action in cases of this kind:

1. No preference right can be accorded a settler who made his settlement on or after February 25, 1920 (see Charles R. Haupt, 48 L. D., 355), nor to one whose settlement was for lands withdrawn or classified as valuable for oil or gas deposits.

2. In order to be entitled to a preference right, the settler must have, at the time the lands were withdrawn, classified or reported as valuable for oil or gas, done everything possible under the non-mineral land laws toward making entry. If the lands were subject to entry at that time, and were not entered by him, the settler does not acquire any preference by later making application to enter said lands. Ada Fletcher (49 L. D., 204).

3. A preference right may be exercised by a settler on lands subject to settlement although he has not made entry, if said failure is due to the fact that the lands are not open to entry under the homestead laws. In such case he will, upon the withdrawal, classification or report that the lands are valuable for minerals, be required to file an election to make entry, when the lands become subject thereto, with a reservation of the oil and gas deposits to the United States in accordance with the act of July 17, 1914 (38 Stat., 509).

4. In cases where the prospective oil and gas value of unsurveyed lands or lands suspended for survey upon which there is a valid settlement is brought to the attention of the Land Department by an applicant for a permit under section 13 of the leasing act, the procedure directed in section 12 (c) of the leasing regulations, approved March 11, 1920 (47 L. D., 437), will be followed, and the

mineral waiver above described will be required. *Newton v. Flesher* (unreported), decided March 31, 1922, and departmental letter dated December 7, 1922, *in re* Flora A. Kable.

5. Every applicant for permit for unsurveyed lands or lands, which, though subject to settlement, are not subject to entry, must state in his application or show by affidavit of a credible witness, that there are no settlers upon the land, or if there be settlers, give the name and post-office address of each and a description of the lands claimed, by metes and bounds and approximate legal subdivisions, if unsurveyed. Upon receipt of an application which shows that there are settlers on the land included therein, you will serve notice by registered mail on each settler that an application for permit has been filed and allow him 30 days from notice within which to file a full statement of the facts of his settlement claim, and any objection he has to the issuance of the permit and to state whether he will claim a preference right to a permit to prospect the land if he be found entitled thereto. If no objection be filed in response to such notice, the application for permit will be considered without regard to the claim of such settler, except that a bond will be required in proper cases as security for damage to the settler's crops and improvements. Such settler will be required, when he makes entry for the land, to file consent to a reservation of the oil and gas to the United States, unless the permit has been canceled.

If the settler files objection to the issuance of the permit and shows that he has a valid settlement claim, the procedure will be as follows:

(a) If the lands have not been withdrawn or classified as valuable for oil and gas deposits, the General Land Office will proceed as indicated in section 4 of these regulations.

(b) If, however, the lands have already been withdrawn or classified as mineral, the General Land Office will proceed in accordance with section 3 hereof.

6. Where settlement has preceded the filing of an application for a prospecting permit, and no preference right is claimed or exists in the settler, the applicant for permit will be required to furnish a bond in the sum of \$2,000, as security for damage to his crops and improvements, as in the case of applications or entries made pursuant to the act of July 17, 1914 (38 Stat., 509).

7. Any permits issued pursuant to representations by the applicants that there are no settlers on the land, are and will be issued subject to the rights of any settlers upon the land at the time the application was filed; and the claims of said settlers are hereby declared to be of the class covered by the term "valid rights" in the general

excepting clause in each permit, which reads, "valid rights existing at the date of this permit will not be affected hereby."

You will examine all applications hereafter presented and require compliance with the requirements hereof, during the 30-day period of suspension prescribed in section 4 of the general regulations approved March 11, 1920, Circular No. 672 (47 L. D., 437).

Please secure the widest publicity possible, without expense to the Government, for these regulations.

WILLIAM SPRY,  
*Commissioner.*

Approved:

E. C. FINNEY,  
*First Assistant Secretary.*

### ALGOMA LUMBER COMPANY v. KRUGER.

*Decided November 15, 1923.*

SURVEY—BOUNDARY—PATENT—IMPROVEMENTS—PUBLIC LANDS—SETTLEMENT—  
HOMESTEAD ENTRY.

A private survey made for the purpose of marking on the ground a theoretical line, platted but not run by the Government, where executed within the allowable departure from cardinal course, and relied upon by an owner under title passed by the United States in the placing of improvements upon the patented land, will not be disturbed, but it will be adopted by the Government as a boundary for closure of the survey of the adjoining public land.

FINNEY, *First Assistant Secretary:*

This controversy relates to the establishment of a survey line to mark the boundary between a section of public land and a section of land in private ownership.

In the year 1872 the west boundary line of T. 37 S., R. 9 E., W. M., Oregon, was run, and the field notes show that a corner stone was set for corner common to sections 18 and 19, said township and sections 13 and 24 of T. 37 S., R. 8 E. By prior survey of T. 37 S., R. 8 E., the greater portion of that township was returned as covered by the waters of Klamath Lake, including the sections on the east border thereof, but on January 19, 1882, upon application by the State, the Commissioner of the General Land Office approved a plat of fractional sections 1, 12, and 13, said township, made by protraction from the survey corners on the east. The south boundary of section 13 was defined by a line protracted on the plat due west to the lake from the corner common to sections 13 and 24, and 18 and 19, theretofore established as above mentioned. These fractional sections 1, 12, and 13, as thus protracted, were conveyed to the State as swamp land, and in the year 1911, by mesne conveyances,

the Algoma Lumber Company acquired title to the south part of section 13. At that time the Government had not actually run the line between section 13 and the remaining public land southward.

The company in 1911 caused survey of the said line to be made by a local surveyor. About that time also the company placed certain buildings of considerable value on the land within one or two feet north of the line so run in connection with its lumbering operations.

On May 4, 1915, August Kruger squatted on the unsurveyed land south of section 13. At that time the unsurveyed land was embraced in reclamation withdrawal under the first form made by order of January 28, 1905, for the use of the Klamath Project. Kruger applied for restoration of the land from the withdrawal and also for survey thereof. In pursuance of that application survey was made of fractional sections 24, 25, 26, 35, and 36, said township, the plat of which was approved June 5, 1917. That survey fixed the boundary line between sections 13 and 24 about four chains south of the old protracted line of the south boundary of section 13 and intersected Kruger's house. May 16, 1919, Kruger executed his homestead application for lots 2, 3, 4, and 7, Sec. 24, and at the same time asked for resurvey of the area between old section 13 and section 24 as thus established, and that he be permitted to enter the additional area. These were filed in the local office May 20, 1919, and on that date the application to enter was rejected because the lands were embraced in withdrawal as above stated. Kruger appealed, and by order of August 22, 1919, the lands embraced in fractional section 24 were restored to entry upon condition that the land remain subject to flowage and seepage rights of the United States to be provided by stipulation on the part of the entryman.

November 24, 1919, the local officers allowed Kruger's application as to the surveyed lands applied for in section 24, subject to the conditions stated, but rejected the application for the unsurveyed strip north of the north boundary of section 24. That action was affirmed by the Department in its decision of May 8, 1920, it being held that application to enter could not be entertained until the said surplus strip had been surveyed.

Owing to the confusion in the surveys, a portion of this strip has been the object of controversy between Kruger and the said company for several years. September 25, 1920, the Commissioner of the General Land Office directed the surveyor general to survey the said strip and to designate same as section 37. In December, 1921, survey was made, and in that survey the line for the south boundary of section 13 was run parallel to the subdivisional lines south thereof, and departed slightly from a due west course, being run at S. 89° 57' W., and intersected some of the company's buildings. The company accordingly filed protest against acceptance of that line, asked

for restoration of the land from withdrawal and requested that it be accorded preference right of entry for same.

August 4, 1922, the Commissioner directed that an investigation be made as to the actual line run out by the surveyor for the company in 1911, and that if it be found to have been established within the limits and regulations prescribed for public surveys it would be recognized as an acceptable line. The Government surveyor accordingly reran the line on a course S. 89° 39' W., which approximately followed the line of the company's surveyor and cleared by about one foot the adjacent principal improvements of the company.

By decision of July 17, 1923, the General Land Office in effect abandoned its order of August 4, 1922, and concluded that the line should be established on a due west course. The company has appealed from that action.

The immediate dispute now before the Department is in respect to the acceptance of this last surveyed line. Kruger insists that the line should be run due west from the old established corner, with reference to which the protracted survey plat was made; while the company urges that the line last run on course S. 89° 39' W. is within the allowable departure from cardinal direction recognized in public surveys, and should be adopted.

The contention of the company is in harmony with the attitude of the General Land Office in its order of August 4, 1922, above referred to, and the Department is impressed with the fairness of that position. The identification by survey on the ground which was made by the local surveyor to mark the theoretical line platted but not run by the Government, was executed within the allowable limit of error. It was relied upon by the owner under the title passed by the Government in the placing of improvements. If the line had been actually run by the Government resulting in the same degree of error it would not have been disturbed even in the absence of a private claim based thereon. No reason is apparent why the work of a local surveyor performing a service omitted by the Government should be held to closer scrutiny than that required in respect to official public-land surveys. There is strong reason for recognizing such line as an appropriate line under such conditions. The Government is now concerned with the establishment of a line by an official survey to mark the division between the private land and the public land. In doing this, if it can protect valuable improvements innocently placed, under circumstances such as here disclosed, and still keep within the allowable departure from cardinal course, that object should be accomplished. Certainly there is no adverse claim which can be recognized as affording an obstacle to the Government in according this just measure. There appears to be less than one acre of land between the disputed lines.

The special agent who investigated the case reported that the company acted in good faith in the survey of its holdings and the construction of its improvements prior to the time of Kruger's settlement upon the unsurveyed and withdrawn land. He found, however, evidences of encroachment by the company on the withdrawn area by fencing and the building of certain small houses south of its own surveyed line after the assertion of Kruger's claim. It appears that there is one other settler claiming a portion of this unsurveyed and withdrawn strip. It is clear that none of these parties could acquire any rights to the withdrawn land. If it should be restored to entry, it will then be appropriate to consider any applications filed therefor.

The special agent reports that the land is adjacent to the town of Algoma and appears to have considerable prospective value for town-site purposes as an addition to that town. This point is also strongly urged by the company. None of the claims involved in this record would appear to afford an obstacle to reservation and disposal of this land under sections 2380 and 2381, Revised Statutes, for town-site use, if it be concluded that such action would serve the public need. It is directed that the Commissioner of the General Land Office give this feature of the case consideration and submit appropriate recommendation in the premises.

In the absence of other sufficient objection the survey of the north line of section 37 as last run on the course S. 89° 39' W. will be accepted.

The decision appealed from is accordingly reversed.

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#### ALGOMA LUMBER COMPANY v. KRUGER.

Rule enunciated in departmental decision of November 15, 1923 (50 L. D., 402), adhered to in decision on motion for rehearing by First Assistant Secretary Finney, June 16, 1924.

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#### SHAW v. RINK.<sup>1</sup>

*Decided February 20, 1924.*

OIL AND GAS LANDS—PROSPECTING PERMIT—LEASE—PREFERENCE RIGHT—SECRETARY OF THE INTERIOR—SUPERVISORY AUTHORITY.

Included in the general power conferred upon the Secretary of the Interior by section 32 of the act of February 25, 1920, to make regulations and to do all things necessary to accomplish the purposes of the leasing act, is the discretionary authority to prescribe conditions with respect to the exercise of the preference right to a permit or lease accorded by that act.

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<sup>1</sup> See decision on rehearing, page 409.

WAIVER—OIL AND GAS LANDS—PROSPECTING PERMIT—HOMESTEAD ENTRY—PREFERENCE RIGHT.

A waiver of a legal right is an intentional foregoing of the exercise of that right, and where the question arises as to whether silence or failure to act constitutes a constructive waiver, the conduct of the one on the part of whom the waiver is imputed may be considered in determining that point.

WAIVER—ESTOPPEL—OIL AND GAS LANDS—PROSPECTING PERMIT—HOMESTEAD ENTRY—PREFERENCE RIGHT.

A waiver differs from an estoppel in that it is not dependent for its effectiveness upon the action of others.

OIL AND GAS LANDS—PROSPECTING PERMIT—NOTICE—PREFERENCE RIGHT—HOMESTEAD ENTRY—WAIVER.

Nonaction on the part of one to whom is accorded a preference right to an oil and gas prospecting permit by section 20 of the act of February 25, 1920, after service of notice upon him by a permit applicant in accordance with a departmental regulation issued pursuant to that act, creates a constructive waiver of the preference right which estops him from ever thereafter asserting the right, notwithstanding that the application in connection with which the notice was served is disallowed.

COURT AND DEPARTMENTAL DECISIONS CITED AND APPLIED.

Cases of *Armstrong v. Agricultural Insurance Co.* (29 N. E., 991), *List and Son Co. v. Chase* (88 N. E., 120), *Kennedy v. Manry* (66 S. E., 29), *Fairbanks, Morse and Co. v. Baskett* (71 S. W., 1113), *Marine Iron Works v. Wiess* (148 Fed., 145), and *Johnson v. Patten* (49 L. D., 613), cited and applied.

FINNEY, *First Assistant Secretary*:

E. S. Shaw has appealed from the decision of the Commissioner of the General Land Office, dated January 14, 1924, in so far as said decision held that Bert S. Rink, patentee under the homestead laws for lots 3, 4, 5, 6, Sec. 26, lots 1 and 2, W.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , NW  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , Sec. 27, T. 4 N., R. 92 W., 6th P. M., Glenwood Springs, Colorado, land district, was entitled to a preference right to a permit to prospect for oil and gas, pursuant to section 20 of the leasing act of February 25, 1920 (41 Stat., 437), and rejected Shaw's application for a similar permit, filed, pursuant to section 13 of the leasing act, on August 11, 1923, to the extent of its conflict with an application filed by Rink, on October 19, 1923, in the exercise of this preference right.

It is not denied by this appellant that Rink made his entry prior to the inclusion of the land in Petroleum Reserve No. 61, by Executive order of October 25, 1918, and thereafter received a patent reserving the oil and gas deposits to the United States under circumstances which bring him within the purview of section 20 of the leasing act, as one of the persons entitled to a preference right to a prospecting permit.

The question raised is whether the patentee is to be held to have permanently waived his preference right to a prospecting permit on August 30, 1920, through his failure to exercise said right within

thirty days prior thereto, although personally served with notice to do so, in accordance with section 12(a) of the departmental regulations under the leasing act, approved March 11, 1920 (47 L. D., 437), by the Matador Petroleum Company, which had filed application for a prospecting permit under section 13 of the leasing act on August 25, 1920. A question was raised by the Department as to the qualifications of this company to receive a permit, in view of alien ownership of much of its stock; and, on August 11, 1923, the company filed a withdrawal of said application, which was accepted.

The Commissioner stated in the decision appealed from that—

It is considered by this office that the preference right is a personal right which may be waived by the entryman as to an applicant seeking a prospecting permit on the lands and subsequently asserted as to another such applicant. The oil and gas leasing act and the regulations thereunder in no way restrict an entryman as to time of filing his preference right application except that paragraph 12(a) of said regulations (circular No. 672) provides that he must file such application within 30 days from service of notice on him by an applicant of said applicant's permit application. It is considered that should the said permit application never materialize into a permit the entryman's preference right still exists as to all other prior or subsequent applicants.

It is urged by the appellant that the preference right was unconditionally waived by the failure to make application, after due notice in accordance with the leasing regulations, and that said waiver forever foreclosed his claim of preference.

The provision of section 20 of the leasing act is that the entryman, selector, or patentee "shall be entitled to a preference right to a permit," and no provision is made respecting the time and mode of asserting this preference. Determination of that point is left to the Secretary under the general discretionary power conferred by section 32 of the leasing act. *Johnson v. Patten* (49 L. D., 613).

In section 12(a) of the leasing regulations of March 11, 1920, as amended to October 29, 1920, *supra*, the Department prescribed the following method for asserting preference rights in cases such as the one now under consideration:

(a) Should an application for permit for entered or patented lands *with a reservation* of the oil and gas content to the United States be filed by a person other than the entryman or owner of the land, the applicant will be required to serve *personal notice* of such application upon the owner or owners of the land so entered or patented, with a warning therein that if said owner desires to exercise his preference right, if any, to a permit, he must file within 30 days his application therefor in the proper local land office. The applicant must furnish evidence of the service of notice on the owner and evidence that the party served is the owner of the land involved, either by his affidavit, duly corroborated, or by certificate of the officer in whose office transfers of real property are to be recorded.

The ultimate question is whether failure to exercise a preference right, after the notice prescribed in the foregoing regulations, is,

*as to waiver + estoppel*

*See 78 Atlantic 402*

*114 NW 893*

*29 Amtherm 342*

*67 SW. 797*

without more, to be construed as an unconditional waiver of that right.

It is well settled that a waiver of a legal right is an intentional foregoing of the exercise of that right. Where there is an affirmative act expressing such intent, the matter presents little difficulty. Where, however, the waiver is constructive, i. e., presumed from conduct or failure to assert a right, more difficulties are presented. Mere silence at a time when there is no occasion to speak is not a waiver, nor evidence from which a waiver may be inferred. *Armstrong v. Agricultural Insurance Co.* (29 N. E., 991); *List and Son Co. v. Chase* (88 N. E., 120).

It can not be doubted, however, that the general power to make regulations and to do all things necessary to accomplish the purposes of the leasing act, conferred upon the Secretary in section 32 of said act, authorizes him to prescribe conditions with respect to the time for exercising a preference right which may create a *duty* in the entryman or patentee to act in the exercise of that preference.

In the exercise of this discretionary power, the Department, in section 12 (a) of the regulations, prescribed a period of thirty days after notice of the pendency of an adverse claim as the period during which entrymen patentees were under a duty to exercise their preference rights. In this case the patentee Rink did nothing, and was not thereafter at liberty to assert the preference against the Matedor Petroleum Company. The Government was warranted in assuming that the preference right was waived, and in taking further steps looking to the granting of a permit to said company. If said company was in fact disqualified to take a permit, such fact, while it could have been presented by the patentee by way of protest, and as a reason why he should not be required to exercise his preference right at that time, was not enough to relieve him from the duty, created by the regulations, of asserting his preference or showing cause why he should not do so.

Nor is it material that the applicant company later withdrew its application, as a waiver is not dependent upon action of others for its effectiveness as is true in the case of estoppel. *Kennedy v. Manry* (66 S. E., 29); *Fairbanks, Morse and Co. v. Baskett* (71 S. W., 1113).

There remains the question whether said waiver was unconditional and divested the patentee of all preference rights, even as against subsequent applicants for permits.

The question as to whether there has been a waiver or not, and the scope of such waiver, is a matter of intent, to be arrived at from consideration of the appellant's conduct. The duty to act which made his silence amount to a waiver was created by the Department's regulations; and the intent of this appellant, there being no evidence to the contrary, must be considered as coextensive with their scope.

Said regulations contemplated the ordinary case, in which an applicant not entitled to the preference would be not only qualified to acquire a permit, but would accept one and test the oil possibilities of the land, in accordance with the terms of said permit, thereby disposing of the question of preference for all time.

In the present case it seems clear that Rink intended that the land should be prospected by others, and that he had no desire, at that time, to exercise the preference given him by the leasing act. His failure to act was then intended as a final and complete waiver, and can not be diminished or altered by a subsequent change of mind, when the land has been applied for by another who has acted upon the belief that said waiver was final. In such case he is estopped to reassert his preference. *Marine Iron Works v. Wiess* (148 Fed., 145). That this appellant relied upon Rink's previous waiver is alleged in this appeal, and is fortified by the circumstance that he did not serve notice upon the patentee to exercise such right, as would have been necessary had not the preference been waived.

This appellant, having initiated the first claim after the withdrawal of the application by the Metador Petroleum Company, has a prior right to a permit, as against Rink, and the latter's application must be rejected.

The Commissioner's decision is reversed.

### SHAW v. RINK (ON REHEARING).

*Decided August 5, 1924.*

#### OIL AND GAS LANDS—PROSPECTING PERMIT—NOTICE—RECORDS—HOMESTEAD ENTRY—PREFERENCE RIGHT.

A notice by a party not of record as a *bona fide* applicant for an oil and gas prospecting permit, reciting a mere intent to make application in the future, is not such a notice as is contemplated by section 12 (a) of the leasing regulations, or which puts the surface entryman under any duty to exercise his preference right.

#### OIL AND GAS LANDS—PROSPECTING PERMIT—NOTICE—PREFERENCE RIGHT.

The posting of a notice of intention to make application for an oil and gas prospecting permit upon land embraced within a surface entry, as provided in section 13 of the leasing act, merely preserves for a limited period a preference right to a permit as against other applicants under that section, but rights of claimants under other sections of the act are unaffected thereby.

#### OIL AND GAS LANDS—PROSPECTING PERMIT—PREFERENCE RIGHT—NOTICE—HOMESTEAD ENTRY—ADVERSE CLAIM.

A regulation which requires that a surface entryman exercise a preference right to a prospecting permit under section 20 of the leasing act, upon service of notice by one having an adverse application pending, or to show that the adverse claimant is disqualified to hold a permit, is a regulation necessary and proper to achieve the purposes of the act, and is authorized by section 32 thereof.

FINNEY, *First Assistant Secretary*:

By decision of February 20, 1924, in the case of *Shaw v. Rink* (50 L. D., 405), the Department held that Bert S. Rink, patentee under the homestead laws, with oil and gas rights reserved to the United States under the act of July 17, 1914 (38 Stat., 509), for lots 3, 4, 5, 6, Sec. 26, lots 1 and 2, W.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , NW.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , Sec. 27, T. 4 N., R. 92 W., 6th P. M., Glenwood Springs, Colorado, land district, had waived his preference right to a permit to prospect for oil and gas thereon, under section 20 of the leasing act of February 25, 1920 (41 Stat., 437), and had no prior rights as against E. S. Shaw, an applicant for a similar permit pursuant to section 13 of the leasing act.

The basis for this decision was that the entryman failed to respond to a notice, served on July 30, 1920, by the Matador Petroleum Company, to exercise his preference right, and failed to assert any claim of preference until October 19, 1923, when he filed an application for a permit. Prior thereto, the Matador Petroleum Company had withdrawn its application, and Shaw had filed his application pursuant to section 13 of the leasing act.

The case is again before the Department, on a motion for rehearing filed by Rink and entertained on April 21, 1924. An adjustment of the conflicting claims has been effected by the parties as to all the land except lots 3, 4, and 5, Sec. 26, and the finding herein will relate only to that area.

In this motion it is pointed out that the Matador Petroleum Company did not, on July 30, 1920, the date of service of notice upon the entryman, Rink, have an application for permit of record; and it is claimed that, in order that the waiver of preference held to exist in the previous decision in this case may properly be found, it must appear that the notice was served by one who had an application pending and who was qualified to receive a permit. On the latter point it is charged that the Matador Petroleum Company was disqualified to acquire a permit because of alien ownership of its stock.

Examination of the records discloses that the notice served upon the entryman, Rink, on July 30, 1920, recited that the Matador Petroleum Company "expected," within 30 days, to file an application for a permit. It also appears that while notice of intention to make application was posted on July 30, 1920, on Sec. 22, said township, such application was not filed until August 25, 1920.

This raises the question whether the notice served conformed to the requirements of the regulations governing such notices. The direction that such notice be served is stated in section 12(a) of the regulations of March 11, 1920 (47 L. D., 437), as follows:

Should an application for permit for entered or patented lands *with a reservation* of the oil and gas content to the United States be filed by a person other than the entryman or owner of the land, the applicant will be required to serve *personal notice* of such application upon the owner or owners of the land so entered or patented, with a warning therein that if said owner desires to exercise his preference right, if any, to a permit, he must file within 30 days his application therefor in the proper local land office. The applicant must furnish evidence of the service of notice on the owner and evidence that the party served is the owner of the land involved, either by his affidavit, duly corroborated, or by certificate of the officer in whose office transfers of real property are to be recorded.

This regulation refers to notices by an "applicant," and directs that he serve "*notice of such application*" [italics supplied] upon the owner of the land entered or patented with a mineral reservation. The expressed requirements of this regulation therefore necessitate the existence of record in the Land Department of an application by the person serving the notice.

Not only is notice by an applicant expressly required, but the situation is one in which no warrant would exist for a regulation permitting persons, not themselves of record as intending in good faith to develop the mineral deposits, to place upon a surface entryman the burden of exercising a preference conferred upon him by statute. The right given in section 20 of the leasing act being one of *preference* presupposes an adverse claimant over whom the entryman is to be preferred; and a regulation which requires that the entryman exercise that preference, on penalty of a waiver thereof, would only be authorized if necessary to accomplish the purposes of the leasing act, i. e., to encourage persons to develop the oil and gas deposits, as provided in the leasing act.

A notice by a party not then of record as a *bona fide* applicant for a permit, which notice recited a mere intent to make application in the future, is not such a notice as is contemplated by section 12(a) of the leasing regulations, *supra*, or which puts the surface entryman under any duty to exercise his preference right. Nor is it material that the party giving such notice to the surface entryman had, at the time of service, posted upon or near the land in the surface entry a notice of intention to make application, as provided in section 13 of the leasing act. Such notice merely expresses an intent to *thereafter* initiate an application for a permit, and its only effect is to preserve for a limited period a preference right to a permit in the person posting, as against other applicants under section 13 of the act. Rights of claimants under other sections of the act are unaffected thereby.

In holding that one who serves valid notice under section 12(a) of the leasing regulations must, at the time of service, have a pending application for permit for the land involved, the Department does

not mean to impair the right of one who has such an application pending to serve notice by a duly authorized agent, as appears to have been attempted in this case.

As to the proposition that the applicant serving notice must be found to have a perfected application and to be qualified to receive a permit before notice to an entryman under section 12(a) shall be binding, it must be borne in mind that section 20 of the leasing act did not confer a right to a permit, but a mere preference over others, to entrymen who were qualified to receive permits (*State of Wyoming v. Fry and Doyle*, 49 L. D. 564), and that the time for exercising such preference right was left to be prescribed by regulations. It only seems necessary to point out that a requirement that the adverse application be adjudicated as perfected would work endless confusion and delay in action upon applications filed for the development of deposits which the United States has reserved from nonmineral entries for disposal under the leasing act, and that a regulation which requires the surface entryman to exercise the preference given him by section 20 of the leasing act, or to show that the adverse claimant is disqualified, is a regulation necessary and proper to achieve the purposes of the act, and is authorized in section 32 of said act.

The views expressed in the decision of February 20, 1924, are adhered to as to the effect of a notice duly served, pursuant to section 12(a) of the leasing regulations, but, in view of the character of the notice shown to have been served, the Department now holds that the entryman, Rink, is entitled to a preference right to a permit as to the lands described herein as the subject of this decision, and the previous decision is modified to conform herewith.

### PROHIBITION AGAINST FEDERAL EMPLOYEES HOLDING INTEREST IN INDIAN OIL AND GAS LEASE.

#### INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,  
*Washington, D. C., April 12, 1924.*

#### THE COMMISSIONER OF INDIAN AFFAIRS:

All existing regulations governing the leasing of Indian lands, both allotted and unallotted, for oil, gas, and other mining purposes are hereby so amended as to provide that no lease, assignment thereof, or interest therein will be approved to any employee or employees of the United States Government whether connected with the Indian Service or otherwise, and no employee of the Interior Department shall be permitted to acquire any interest in leases of the above character covering restricted Indian lands by ownership of stock in corporations having leases or in any other manner.

Subsequent regulations pertaining to leases of this kind hereafter submitted to this Department for approval must contain substantially a like provision.

HUBERT WORK,  
Secretary.

*Overruled so far as conflict, 51 L.D. 36*  
WITBECK v. HARDEMAN.

Decided April 16, 1924.

OIL AND GAS LANDS—PROSPECTING PERMIT—MINING CLAIM—PREFERENCE RIGHT—NOTICE.

The preference right to prospect for oil and gas accorded by section 13 of the act of February 25, 1920, upon fulfillment of the notice requirement of that section, was carried over into the leasing act from the provision of the placer-mining laws which gave priorities to the one first locating mineral land on the ground and posting appropriate notice of the claim, and is equally applicable to both surveyed and unsurveyed land.

OIL AND GAS LANDS—PROSPECTING PERMIT—APPLICATION—NOTICE—EVIDENCE.

The fact that an application for an oil and gas prospecting permit was deposited in the post office on a certain day and at a certain hour, does not, when wholly unsupported by other evidence, create a statutory presumption, such as obtains in certain cases involving mere notices to individuals, that the application was delivered in due course.

MILITARY SERVICE—OIL AND GAS LANDS—PROSPECTING PERMIT—PREFERENCE RIGHT.

Military service is not recognized by the act of February 25, 1920, as a ground for the award of a preference right to an oil and gas prospecting permit.

DEPARTMENTAL DECISIONS CITED AND APPLIED.

Cases of William C. Young (2 L. D., 326), Lewis v. Morris (27 L. D., 113), Barnes v. Smith (33 L. D., 582), Heter v. Lindley (35 L. D., 409), Bumpers v. Holloway (48 L. D., 269), and Wagner v. Coffin *et al.* (49 L. D., 655), cited and applied.

FINNEY, *First Assistant Secretary*:

This is an appeal by Albert T. Witbeck from the decision of the Commissioner of the General Land Office dated January 24, 1924, which rejected his application, filed, as disclosed by the records, on November 12, 1923, for a permit to prospect for oil and gas, pursuant to section 13 of the leasing act of February 25, 1920 (41 Stat., 437), upon the NW.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ , Sec. 25, T. 21 N., R. 10 W., Baton Rouge, Louisiana, land district. The Commissioner found that a prior claim to a permit had been initiated, pursuant to section 13 of the leasing act, by Jack Hardeman, who, on November 11, 1923, posted notice of intention to make application for a prospecting permit, and, on December 11, 1923, within 30 days following such posting, filed application for a prospecting permit for the land involved.

Two claims are made by this appellant in support of his appeal: First, that the provision for a preference by one who posts notice, in

section 13 of the leasing act, was only intended to apply to unsurveyed land, incapable of definite description or location upon maps or plats, and can not be held to vest a preference in a person who posts notice upon surveyed land; and second, that his application was in fact received in the local land office on November 10, 1923, but was allowed to remain unnoted in said office until November 12, 1923. He also claims such preferences as are accorded veterans of the war with Germany.

Appellant cites, in support of his claim that the notice referred to in section 13 of the leasing act relates only to unsurveyed lands, the following language in said statute:

Whether the lands sought in any such application and permit are surveyed or unsurveyed the applicant shall, prior to filing his application for permit, locate such lands in a reasonably compact form and according to the legal subdivisions of the public land surveys if the land be surveyed; and in an approximately square or rectangular tract if the land be an unsurveyed tract, the length of which shall not exceed two and one-half times its width, and if he shall cause to be erected upon the land for which a permit is sought a monument not less than four feet high, at some conspicuous place thereon, and shall post a notice in writing on or near said monument, stating that an application for permit will be made within thirty days after date of posting said notice, the name of the applicant, the date of the notice, and such a general description of the land to be covered by such permit by reference to courses and distances from such monument and such other natural objects and permanent monuments as will reasonably identify the land, stating the amount thereof in acres, he shall during the period of thirty days following such marking and posting, be entitled to a preference right over others to a permit for the land so identified.

He claims that the provision for a preference is restricted by these terms to unsurveyed lands which must be identified by metes and bounds descriptions with reference to natural objects.

Such view is not warranted by the terms of the statute, which provide that the preference may be acquired if the applicant shall cause a monument to be erected "upon *the land* for which a permit is sought." [Italics supplied.] There is no express limitation of this preference to notices on *unsurveyed* land. The particularity of description prescribed was made necessary for the accomplishment of the purpose of the notice, namely, to apprise all persons who should read such notice of the extent of the area applied for. Such particularity was evidently considered by the Congress as an adequate substitute for the requirement theretofore customarily made of locators of mineral claims that the corners of their claims be marked on the ground. Obviously a provision would have been inadequate which made sufficient a mere description by legal subdivisions of surveyed lands, whether the survey monuments were or were not then visible on the ground. It is equally clear that public land survey monuments actually on the ground were within the expression "*permanent monuments*" [italics supplied] used in section 13 of

said leasing act, as distinguished from "natural objects" referred to therein.

The purpose of section 13 of the leasing act was to grant permits to *prospectors* for oil and gas; and the preference by notice provision was clearly carried over into the leasing act from the provision of the placer-mining laws under which it has ever been the custom to give priorities to the first person who "located" mineral lands in the field, and erected appropriate notices of his claim. No reason appears for the restriction of this preference under the leasing act to the prospector who observes a favorable site for prospecting operations upon unsurveyed land, and a denial of a like preference to another prospector merely because the land chances to be surveyed. See *Wagner v. Coffin et al.* (49 L. D., 655).

In this case, it seems clear that Hardeman posted notice upon the land on November 10, 1923, and marked the corners thereof by blazing certain trees, which fact was stated in his notice. The Congress has not given to war veterans any preferences in connection with permits and leases under the act of February 25, 1920, *supra*; and there remains only appellant's allegations of priority of initiation of a claim to a permit over Hardeman to be considered.

Appellant claims to be able to prove at a hearing and has submitted certain affidavits in corroboration thereof, the following facts:

That, on November 9, 1923, between the hours of 10 and 11 a. m., he purchased, at the Shreveport, La., post office, a money order for the filing fee on his permit application; that he deposited his application in the Shreveport post office at about 10.20 a. m.; that there was no congestion in the mails on that date; that, under the practice of the post office, a letter mailed at 10.20 a. m. would, on November 9, 1923, have left Shreveport at 4.15 p. m. of the same day; that the train carrying this mail was not delayed on that date but arrived in Baton Rouge at about 4.20 a. m., November 10, 1923; that the mail so transported was delivered to the Baton Rouge post office shortly after the arrival of said train, and that said mail was delivered on that morning (November 10, 1923), shortly before 9 a. m., the opening hour of the land office.

From these facts appellant claims that it must be found the letter was, in fact, delivered to the local officers on the morning of November 10, 1923, but, through oversight or neglect, was not opened until November 12, 1923. In this connection, he points out that November 10, 1923, was Saturday, a legal half holiday, and deduces that the mail for that day was allowed to go over until Monday.

If it be assumed that appellant has established all of the facts alleged, he has not shown, *prima facie*, that his application reached the local office in advance of the posting by Hardeman. His con-

clusion that the letter containing his application was delivered to the local office on November 10, 1923, is based upon an assumption, wholly unsupported by the evidence, that the letter left the Shreveport office in due course, that it was duly delivered at the Baton Rouge post office, and that it was, in fact, in the mail delivered from that post office during the working day of November 10, 1923. There is in this situation no statutory presumption of notice or delivery of a letter sent in due course, such as obtains in certain cases involving mere notices to individuals; and the Department is not prepared to assume, on the evidence before it, that whatever default or delay in the matter occurred was occasioned by its agents.

In view of the fact that the application is noted as received at 3.30 p. m., of November 12, 1923, the Department is convinced that said application was not delivered until some time during that day, and that it was then duly received and assigned a serial number, in accordance with the practice long prevailing, and stated in the cases of William C. Young (2 L. D., 326), Lewis v. Morris (27 L. D., 113), Barnes v. Smith (33 L. D., 582), Heter v. Lindley (35 L. D., 409), and Bumpers v. Holloway (48 L. D., 269).

The Department finds no merit in appellant's claims, and the Commissioner's decision is affirmed, and the case is closed.

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### FRANK M. CZARNOWSKI.

*Decided April 24, 1924.*

#### DESERT LAND—RAILROAD LAND—WITHDRAWAL—STATUTES.

The desert-land act of March 3, 1877, which fixed the sum of twenty-five cents per acre as the price to be paid upon the initiation of all desert-land entries, did not supersede and destroy the proviso to section 2357, Revised Statutes, which fixed a double price for reserved sections within the limits of a railroad grant.

#### REPAYMENT—DESERT LAND—RAILROAD LAND—STATUTES.

A desert-land entryman, who was required to make an initial payment of fifty cents per acre for land within the reserved limits of a railroad grant, is not entitled to repayment under the repayment statutes on the ground that the desert-land act of March 3, 1877, fixed the initial price of twenty-five cents per acre for all desert-land entries.

#### COURT AND DEPARTMENTAL DECISIONS CITED, APPLIED, AND DISTINGUISHED.

Case of United States v. Ingram (172 U. S., 327), cited and applied; case of James Byrne (50 L. D., 161), cited and distinguished.

GOODWIN, *Assistant Secretary*:

Frank M. Czarnowski has appealed from the decision of the Commissioner of the General Land Office dated December 31, 1923, denying repayment of moneys paid in connection with desert-land entry No. 1200, Tucson, Arizona, land district.

It appears from the record that the entry was made January 17, 1888. The price of the land was fixed at \$2.50 per acre, the same being within the primary limits of the withdrawals for the Texas Pacific Railroad Company, of which amount claimant was required to pay 50 cents per acre at the time he initiated the entry. It is admitted upon this appeal that \$2.50 an acre was the proper price to be charged for said lands, but it is contended that the desert-land act of March 3, 1877 (19 Stat., 377), fixed the sum of 25 cents per acre as the price to be paid upon the initiation of all desert-land entries, and there was no legal authority for the requirement of a payment of 50 cents per acre; that the said act provided for the forfeiture of the initial payment in case of failure to complete the entry and forfeiture of 50 cents per acre for such failure was not authorized, and therefore the sum of 25 cents per acre was an excess payment and should be refunded. In support of such contention departmental decision in the case of Heirs of James Byrne (50 L. D., 161) is cited. It is therein stated that "The desert-land act of 1877, under which the entry was made, required an initial payment of 25 cents per acre, and no other law, either prior or subsequent, required more."

The initial payment of 50 cents per acre was required by reason of instructions of the Commissioner of the General Land Office, which provided that the \$2.50 per acre should be paid in two installments; 50 cents per acre at the time of the initiation of the entry, and \$2.00 per acre at the time of submission of final proof. The desert-land act of March 3, 1877, fixed the amount to be paid upon the initiation of an entry at 25 cents per acre and \$1 per acre upon the submission of final proof. As held by the Commissioner, the argument could as reasonably be advanced that there was no authority under said act for a charge upon submission of final proof greater than \$1 per acre. It can readily be seen that if \$2.50 per acre was the proper price for said lands, which is tacitly admitted by claimant, the desert-land act of 1877 is not applicable to entries of the character here involved in so far as the price is concerned. The price of said lands being double the price of other desert lands outside the limits of a railroad grant, the charge of 50 cents upon initiation of the entry being double the price of other desert lands, was a fair and reasonable requirement of the Commissioner. It was no more intended by the statement relied upon in the decision in the Byrne case, *supra*, to hold that an initial payment of 25 cents per acre was only required upon the initiation of desert-land entries whether located within or without the limits of a railroad land grant than it was intended to hold that all such desert-land entries could be completed by the payment of \$1 upon submission of final proof. Such question was not

involved in said case, and as heretofore stated the desert-land act is not applicable as to entries of the character here involved as to the price to be paid for such lands. Such statement, when taken literally, might give some countenance to claimant's contention, but when regarded in the light of the entire opinion, manifestly was not intended to be given the interpretation made by claimant. The charge of 50 cents per acre fixed by the Commissioner as the amount to be paid upon the initiation of an entry such as the one here involved, finds support in the decision of the Supreme Court in the case of *United States v. Ingram* (172 U. S., 327). Ingram paid 50 cents per acre to initiate his entry. He abandoned it and brought suit to recover the money paid upon the theory that lands within the place limits of a railroad land grant are wholly removed from the operation of the desert-land law and the attempted entry was absolutely void. In the decision denying the claim, the court held that the desert-land act of 1877 was not applicable in so far as the price to be paid was concerned for lands within the limits of a railroad land grant; not that such lands could not be disposed of under such act, but only not at the price fixed by that law; that such act did not supersede and destroy the proviso to section 2357 in reference to a double price for such reserved sections. It accordingly follows that the contention of claimant is without merit.

The decision appealed from is affirmed.

### OLIVE M. HARRISON.

*Decided April 24, 1924.*

#### REPAYMENT — ENTRY — COAL LANDS — WITHDRAWAL — AMENDMENT — SURFACE RIGHTS.

The allowance of an entry for land subsequently included within a coal withdrawal is not an erroneous allowance within the purview of the repayment act of June 16, 1880, notwithstanding that at the time of its abandonment by the entryman there existed no law under which it could have been confirmed as to a surface patent.

#### REPAYMENT — ENTRY — RELINQUISHMENT — COAL LANDS — WITHDRAWAL.

A claim for repayment under the act of March 26, 1908, based on the relinquishment of an entry because of its inclusion within a coal withdrawal, can not be allowed unless it is shown as a fact that the withdrawal was the determining factor in inducing the relinquishment.

#### DEPARTMENTAL DECISIONS CITED AND APPLIED.

Cases of William E. Creary (2 L. D., 694), and William H. Irvine (28 L. D., 422), cited and applied.

#### FINNEY, *First Assistant Secretary*:

Olive M. Harrison has appealed from a decision of the Commissioner of the General Land Office, dated December 24, 1923, denying

her application for repayment of moneys paid in connection with desert-land entry No. 6109, Helena, Montana, land district.

The record discloses that the entry was made October 26, 1900. On April 4, 1905, the Commissioner ordered a hearing upon charges preferred by a special agent to the effect that claimant had not complied with the desert-land laws. Such further proceedings were had that by Commissioner's letter "P" of September 24, 1907, the entry was canceled by reason of such charges.

Repayment is claimed for the alleged reason that after the entry was made, the land embraced therein was included in a coal withdrawal of October 15, 1906; that this made it necessary for claimant either to prove that the land was nonmineral in character or to lose the land for the reason that said entry was made for mineral land; that entryman therefore decided to abandon the land and permit the entry to be canceled by the Government. It is accordingly urged that repayment is due under the provisions of the act of June 16, 1880 (21 Stat., 287).

It is argued that the inclusion of the land within the coal withdrawal of 1906 was *prima facie* evidence of its mineral character, and being mineral land, it was not subject to a desert-land application; that by reason of the fact that the entry could not be confirmed as having been made for mineral land, it becomes immaterial as to the cause of its abandonment and repayment is due under the provisions of said act of June 16, 1880. As authority for such contention, the unreported case of Charles Hoepfner, A-4326, decided by the Department May 17, 1923, is relied upon. The Department can not concur in the contention advanced, and after mature consideration is of the opinion that the language used in the Hoepfner case is too broad and same will not be adhered to. (In order for a repayment claim to be properly allowable under the provision in section 2 of the act of June 16, 1880, for repayment in cases where an entry has been erroneously allowed and can not be confirmed, two conditions must concur. In addition to being incapable of confirmation, the entry must have been erroneously allowed in the first instance.) In the instant case it is pointed out that the entry, having been made for land which was afterward included in a coal withdrawal, was not subject to confirmation as having been made for mineral land; that when it was abandoned in 1907 there existed no law under which it could have been confirmed as to a surface patent. However, the entry was not erroneously allowed. Such expression clearly refers to an error on the part of the Government in its allowance. Upon the proofs submitted, the local officers correctly allowed the entry. Where, as in this case, an entry is properly allowed upon the proofs submitted by the entryman, but is thereafter canceled because it has been otherwise ascertained that the land is not of the charac-

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ter represented in the proofs, the right to repayment under the act of June 16, 1880, does not exist. See William H. Irvine (28 L. D., 422). Said act makes it a prerequisite to the allowance of an application for repayment that it must appear that the entry was erroneously allowed, a condition which does not appear in the instant case. See William E. Creary (2 L. D., 694).

Neither can the application be allowed under the act of March 26, 1908 (35 Stat., 48), as repayment under said act is governed by the limitations of the act of December 11, 1919 (41 Stat., 366), which would bar the instant claim as it was not filed until August, 1922. Even were it not barred, it could not be allowed under the act of 1908, for, as correctly held by the Commissioner, before repayment can be made, it must be found as a fact that the withdrawal was the determining factor in the relinquishment or abandonment of the entry, and as entryman made every effort to defeat the charges of noncompliance with the desert-land law preferred against him, the contention that the entry was relinquished because of the inclusion of the land in a coal withdrawal can not be sustained.

The decision appealed from is affirmed.

### STATE OF OREGON v. HYDE.

*Decided April 26, 1924.*

#### FOREST LIEU SELECTION—LACHES—OREGON.

The State of Oregon will be deemed to be in laches and the title of the United States to base lands conveyed by a forest lieu selector indefeasible, upon failure to institute further recovery proceedings within a period of nearly five years after court proceedings instituted by the State to recover the land on the ground that it had been fraudulently acquired from it had been dismissed without prejudice because the United States had not been made a party, notwithstanding that there is no statute of limitations barring actions by the State to recover real property.

#### FINNEY, *First Assistant Secretary*:

The Attorney General of the State of Oregon has filed a protest against the approval of the selection under the exchange provisions of the act of June 4, 1897 (30 Stat., 11, 36), by F. A. Hyde, of lot 10, Sec. 3, T. 1 S., R. 3 W., M. D. M. (0.36 acre), San Francisco, California, land district, in lieu of a like area in the SE.  $\frac{1}{4}$ , Sec. 36, T. 14 S., R. 9 E., W. M., within the limits of the Cascade Range Forest Reservation, Oregon.

The selection was filed December 20, 1899. All of said Sec. 36 was conveyed by the State of Oregon to Hyde on July 10, 1898, and was relinquished to the United States by Hyde and his wife on July 24, 1899.

In August, 1913, the State instituted proceedings to set aside its conveyance of the SE.  $\frac{1}{4}$  and S.  $\frac{1}{2}$  SW.  $\frac{1}{4}$ , said Sec. 36, and other lands, on the ground that the titles to the lands had been acquired from the State by or for the benefit of the defendants, Hyde, Clarke, *et al.*, through fraud and contrary to the laws of the State governing the disposal of the same. Judgments sustaining the allegations of the State were rendered by the trial courts in all but one of the seven suits instituted in as many counties, from which appeals to the State Supreme Court were prosecuted, resulting in the affirmance or modification by that tribunal of the findings of the lower court. (169 Pac., 757 to 780.) Upon the presentation of petitions for rehearing, the Supreme Court adhered to its previously announced opinions. (171 Pac., 582 to 584.)

In its original opinions the Supreme Court modified the decisions of the court below in regard to the titles to base land surrendered to and accepted by the United States, saying:

While these deeds were executed and recorded by the grantors without the knowledge of the grantee, they were placed of record pursuant to a standing offer made by the grantee to accept these lands in exchange for other lands owned by it. The deeds with accompanying evidences of title were subsequently accepted by the officers of the grantee who were authorized to speak for it in that behalf. Clearly these deeds, when so accepted, passed title to the United States.

It was therefore held that, in the absence of the United States as a party to the suit, the court was without jurisdiction, and the proceedings as to said tracts were dismissed without prejudice.

Prior to the beginning of the litigation in these matters by the State of Oregon, investigation of the so-called "Hyde-Benson cases" had been in progress by the Land Department, and was continued while the Oregon cases were pending. Numerous hearings in relation to these forest lieu selections had been ordered, in which the charges were that the base lands therein had been obtained from the State through fraudulent means, by the use of "dummies," and "fictitious persons" as purchasers of school lands. Upon the institution by the State of suits for the recovery of title to said base lands, the hearings were postponed to await the result of the court proceedings. After the decisions of the State Supreme Court, the Commissioner of the General Land Office on January 21, 1920, issued a circular letter consolidating all the pending cases, and as a result seventeen cases were heard at Salem, Oregon, in December, 1922.

Subsequent to the date of the circular letter of January 21, 1920, a compromise was arranged between the State of Oregon and some of the claimants under the selections, whereby the claimants were to pay to the State \$7.50 per acre for so much of the base land as might be necessary to support selection of the area claimed by them,

in consideration for which the State was to execute quitclaim deeds for such quantity of the base land as was needed. Some of the proposed compromises were submitted to the Department, and under date of May 3, 1920, the Department held that where the selections were otherwise proper for allowance, and the State submitted its quitclaim deed to the Government for the base lands, the title would be regarded as quieted in the Government, and the selections should be approved.

At the hearing at Salem, Oregon, in December, 1922, no new evidence was adduced, the transcript thereof consisting mainly of certified copies of testimony and other evidence submitted at the trials before the Oregon Circuit Courts and in the trial of Hyde, Schneider, and others in 1908, in a court of the District of Columbia.

Under date of May 18, 1923, the Commissioner of the General Land Office, being about to consider the record made at Salem, Oregon, in December, 1922, requested departmental instructions, the following being quoted from the Commissioner's letter:

The Supreme Court of Oregon refrained from declaring the State in laches in the suits brought by it in 1913—fifteen years after the execution of the deeds conveying the lands in issue, because of special reasons set out in its decisions, chief of which was lack of notice or knowledge by the State of the frauds committed against it by Hyde, Clarke, *et al.*, and such portion of the decision as was adverse to the State was made without prejudice.

Is the State of Oregon now in laches, not having instituted recovery proceedings within the period of almost five years since the decisions by its Supreme Court became final?

The Department's reply, made June 26, 1923, was to the effect that the rule announced by the Department on April 1, 1918 (46 L. D., 341), relative to base lands procured from the State of California, should be applied.

The protest under consideration discusses at length the departmental instructions of June 26, 1923, and contends that the decision of April 1, 1918, referred to therein, is not applicable to selections based on land procured from the State of Oregon, as Oregon, unlike California, has no statute of limitations which can affect actions by the State to recover real property.

In the case of F. A. Hyde & Co., on rehearing (46 L. D., 341), referred to in the departmental instructions of June 26, 1923, the Department held that the facts in the case distinguish it from the case of State of Oregon *v.* Hyde *et al.* (169 Pac., 757), in that in the latter case the claim of the State was not only not barred by any statute of limitation "but the State was also strongly desirous of recovering its lands."

The State's suits, as heretofore stated, were instituted in 1913—fifteen years after the cause of action arose. The decisions of the

State Supreme Court became final September 12, 1918. At no time since has the State made an effort to secure the permission of the Congress to make the United States a party to a suit to recover the lands described in "Supplement A" of the State Supreme Court's decision. On the contrary, the State has contented itself with an effort to induce the persons for whom the various selections were made to pay \$7.50 per acre for the base lands. In the protest under consideration the Attorney General for the State of Oregon states:

It is true, as stated in the Commissioner's letter, that in many cases the State would prefer to receive \$7.50 per acre for its lands rather than to recover the title to the base lands, and the State officials have relied to a very large extent upon the cooperation of the Federal Government in bringing about this desirable result.

In view of the plainly-expressed attitude of the State, would the Department be warranted in holding that the United States, in approving the selection in question, would obtain a perfect, indefeasible title to the base land? If so, the protest must be dismissed.

Unless it be now held that a suit by the State to recover the lands described in said "Supplement A" is not barred by reason of laches, then the title to the base lands is perfect and indefeasible. The Oregon Supreme Court on January 8, 1918, held that, for the reasons stated by it, the State could not be charged with laches. But more than six years have elapsed since that decision was rendered, and up to the present date the State has contented itself with efforts to collect \$7.50 per acre for the land. The Department is, therefore, warranted in concluding that the selection in question should be adjudicated on the theory that the United States by approving the selection will acquire an indefeasible title to the base lands. The State transferred the base lands direct to Hyde, and he thereafter accepted the offer of exchange made by the act of June 4, 1897, *supra*. It is admitted that the real party in interest is an innocent purchaser of the scrip, and such purchaser is in position to plead the State's laches in the event that the Congress at a later date should permit the United States to be made a party to a suit to recover the base lands.

In its instructions of June 26, 1923, *supra*, the Department, in effect, answered in the affirmative the question propounded by the Commissioner of the General Land Office—

Is the State of Oregon now in laches, not having instituted recovery proceedings within the period of almost five years since the decisions by the Supreme Court became final?

Nothing set forth in the protest under consideration convinces the Department that it would be warranted in longer withholding favorable action on the selection.

The protest is therefore dismissed.

## EDMUND HERREN.

*Decided May 3, 1924.*

HOMESTEAD ENTRY—APPLICATION—SETTLEMENT—OIL AND GAS LANDS—PROSPECTING PERMIT—IMPROVEMENTS—SURFACE RIGHTS—DAMAGES—WAIVER.

A homestead application based upon a claim of settlement initiated subsequent in time to an oil and gas prospecting permit application, can only be allowed subject to the reservations of the act of July 17, 1914, and upon waiver of damages to the surface improvements as required by section 29 of the act of February 25, 1920, and the permit applicant is not obligated to show cause against the allowance of the homestead application upon those conditions.

DEPARTMENTAL DECISION CITED AND APPLIED.

Case of Alfred O. Lende (49 L. D., 305), cited and applied.

FINNEY, *First Assistant Secretary*:

On September 6, 1923, Edmund Herren filed his application, 010420, to enter under section 3 of the enlarged homestead act of February 19, 1909 (35 Stat., 639), lots 4, 5, and 12, Sec. 12, and lots 1 and 2, Sec. 13, T. 38 N., R. 19 W., N. M. P. M., 165.98 acres, in the Durango, Colorado, land district, as additional to his homestead entry 09361, made September 5, 1922, for lots 7 and 8, Sec. 16 (Tr. 53), in said land district. With the application he filed his affidavit alleging that on June 18, 1921, he had established residence on the additional tract applied for, and had purchased from a preceding entryman the fence on the land and procured his relinquishment of the entered land, and that for two years had had 20 acres of the land under cultivation, and by reason thereof he claimed a prior right of entry thereof. On October 6, 1923, the entryman filed a withdrawal of his application as to lot 2, Sec. 13.

The application was subsequent in time to, and in conflict with, oil prospecting permit application 09280 as to lots 5 and 12, Sec. 12, and oil prospecting permit application 09291 as to lots 1 and 2, Sec. 13, and, it having been transmitted by the receiver to the Commissioner for adjustment as to said conflicts, the latter on October 25, 1923, rendered his decision, among other things requiring the homestead applicant within 30 days to file his consent to take the land in conflict subject to the provisions and reservations of the act of July 17, 1914 (38 Stat., 509), and with a waiver of right to compensation in accordance with section 29 of the act of February 25, 1920 (41 Stat., 437).

From said decision the homestead applicant appealed, November 12, 1923, to the Secretary of the Interior. He claims in his appeal that he had been on the land over two years, had thereon a good house and 40 acres in crop, and was complying with the homestead laws; that the applicants for oil prospecting permits have done

nothing to comply with the oil and mineral land laws as set forth in the oil-leasing circular.

The record shows that the oil and gas permittees have not complied with a clause in the Commissioner's decision allowing them respectively 30 days (from November 2, 1923, when said appeal was served on Jackson, and from November 3, 1923, when it was served on Nichols, the prospecting permit applicants) in which to show cause why the homestead application should not be allowed subject to said reservation of mineral to the United States, and the right of its permittees or lessees to prospect for mineral where their right was initiated prior to the homestead filing, and to use the surface without compensation to the homestead claimant therefor.

But it is found by inspection of the records of said oil and gas permittees' applications that each of them initiated his right, by giving notice of his application therefor, in the latter part of 1920, prior to the alleged settlement by the homestead claimant upon the land. Thus the application for homestead entry ranks subsequent in time to, and subordinate to, the applications for mineral permits, and, in pursuance of the departmental policy of imposing by the grant of surface rights no obstacle to oil and gas discovery and development unless such surface entries, if subsequent in time to grant of the mineral permits, are accompanied with waiver of damages to the surface improvements, the Commissioner properly required such waiver. The decision under review is in harmony with the principles laid down in the case of Alfred O. Lende (49 L. D., 305). The mineral permittees were under no obligation to show cause against the homestead application for a surface entry, they being prior in time with their own applications for the mineral permits.

The decision of the Commissioner was accordingly correct, and it is affirmed; and the homestead applicant having refused to file the consent required by the Commissioner's order, his application will be rejected and the case closed as to the land in conflict, unless such consent shall be filed within 10 days after notice to the homestead applicant of this affirmance.

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### MERRILL G. WIDEMAN AND JESSIE F. LOBDELL.

*Decided May 3, 1924.*

#### TIMBER AND STONE ENTRY—NOTICE—PAYMENT.

The requirement that a timber and stone applicant must, within thirty days from service of notice, deposit with the receiver the appraised price of the land, is a departmental regulation which may be waived where good faith has been manifested and its literal enforcement would work hardship not rendered necessary by any public need.

GOODWIN, *Assistant Secretary*:

This is an appeal by Merrill G. Wideman from the decision of the Commissioner of the General Land Office of December 22, 1923, approving the action of the local office in rejecting his soldier's declaratory statement (Coeur d'Alene 011908) for the SW.  $\frac{1}{4}$  NW.  $\frac{1}{4}$ , W.  $\frac{1}{2}$  SW.  $\frac{1}{4}$ , SE.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , Sec. 32, T. 45 N., R. 4 E., B. M., and permitting to stand the timber and stone application (Coeur d'Alene 011884) of Mrs. Jessie F. Lobdell, earlier filed, for the same land.

Appeal is made upon the ground that Mrs. Lobdell was allowed 30 days from the date of acknowledgment of receipt of notice to pay the appraised price of the land, and acknowledged such receipt (evidenced by returned registry card) on October 27, 1923, but did not make the required payment until November 27, 1923, upon which day Wideman tendered his application above mentioned, which was rejected for conflict. It is claimed that Mrs. Lobdell was in default as to time, and that the land was therefore subject to entry under the soldier's declaratory statement.

Excluding the day of acknowledgment of receipt (October 27), there remained four days of the month of October, to which must be added 27 days of the month of November. This would total 31 days, while the regulations (see Circular No. 289, reprint of March 1, 1916, par. 20) require that a timber and stone applicant "must, within 30 days from service of notice, deposit with the receiver \* \* \* the appraised price of the land." Mrs. Lobdell appears, therefore, to have been in default one day as to time.

It does not follow, however, that the application of Wideman should be, *ipso facto*, accepted and made of record, for the regulations above referred to further provide (see par. 30) that:

After an application has been presented hereunder no other person will be permitted to file on the land embraced therein under any public-land law until such application shall have been finally disposed of adverse to the applicant.

Mrs. Lobdell's application had not been finally disposed of adversely when Wideman's was tendered. She states that on November 26, 1923, she appeared at the local office and tendered a check for the appraised price of the land, and was informed that such check could not be accepted, but that the allowed 30 days would not expire until the close of the 27th. The following day she made acceptable tender. She further states that she has spent considerable time and money in connection with her application. The time requirement is not statutory, but an executive regulation which the Department may waive where its literal enforcement would work hardship not rendered necessary by any public need.

The decision appealed from is accordingly modified, and, as modified is affirmed.

**REGINALD C. WILLIS.***Decided May 3, 1924.***PHOSPHATE LANDS—PROSPECTING PERMIT—LEASE—SECRETARY OF THE INTERIOR—SUPERVISORY AUTHORITY.**

The act of February 25, 1920, contains no provision authorizing the issuance of permits to prospect for phosphate or to award leases as a reward for discoveries, but there is vested in the Secretary of the Interior discretionary authority to fix by general regulations the terms under which leases may be awarded under section 9 of that act.

**PHOSPHATE LANDS—LEASE—SECRETARY OF THE INTERIOR.**

The general phosphate regulations of May 22, 1920, being applicable to leases in proven fields, do not contemplate a situation in which considerable preliminary work is necessary before the actual opening of a mine can be undertaken, and, in order to make effective the purpose of the leasing act, it is clearly the duty of the Secretary of the Interior to prescribe such terms for leases as will promote the development of unproven fields.

**DEPARTMENTAL REGULATIONS AMENDED.**

Sections 4 and 5 of the phosphate regulations of May 22, 1920 (47 L. D., 513), amended.<sup>1</sup>

**FINNEY, *First Assistant Secretary*:**

Reginald C. Willis has appealed from the decision of the Commissioner of the General Land Office, dated November 26, 1923, which required him to consent to accept a lease for phosphate, pursuant to the leasing act of February 25, 1920 (41 Stat., 437), for the SW.  $\frac{1}{4}$ , W.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , Sec. 22, all Secs. 27 and 34, T. 9 N., R. 12 W., M. M., Missoula, Montana, land district, subject to a royalty rate of two per cent of the gross value of the phosphate or phosphate rock at the mine, a minimum investment of \$60,000, and a minimum production of 1,000 tons a year.

Leases granted pursuant to section 9 of the leasing act of February 25, 1920, *supra*, require under the provisions of section 4 of the general regulations, approved May 22, 1920 (47 L. D., 513), that not less than one-third of the minimum investment shall be expended in development of the mine during the first year, and a like amount for each of the two succeeding years, unless said minimum has sooner been invested.

This appellant claims that the existence of workable phosphate deposits in the land is so uncertain, and the necessity for prospecting and work preliminary to the opening of a mine and the establishing of feasible means of transportation is so great, that the terms proposed prohibit development of the field. He estimates that at least three years will be required, with an expenditure of about \$5,000, to prospect for the deposits, to properly open a mine, and to arrange for transportation, and asks for a modification of the terms proposed.

<sup>1</sup> See Circular No. 936, amending paragraphs 4 and 5 of the Phosphate Regulations of May 22, 1920 (47 L. D., 513), page 503.

There is no provision in the leasing act which authorizes the Department to issue permits to prospect for phosphate or to award leases as a reward for discoveries. There is vested in the Secretary, however, discretionary power to fix, by general regulations, the terms of phosphate leases issued under said act.

The regulations heretofore adopted are applicable to leases of phosphate deposits in proven fields, and are necessary to accomplish the purposes of the act and to conserve the interests of the Government. They do not, however, contemplate a situation in which considerable preliminary work is necessary before the actual opening of a mine can be undertaken. The leasing act is, by its title and its provisions, an act to *promote* the mining of coal, phosphate, oil, etc.; and as no provision has been made for the issuance of permits to prospect for phosphate as is provided in said act with respect to other minerals, it is clear that the duty rests in the Department to prescribe such terms for leases as will promote the development of unproven fields. Section 4 of the regulations of May 22, 1920, *supra*, is accordingly amended to read as follows:

(a) An actual bona fide expenditure for mine operations, development or improvement purposes of the amount determined by the Secretary of the Interior will be a condition in each lease as the minimum basis on which each lease will be granted, with the requirement that not less than one-third of such proposed investment shall be expended in development of the mine during the first year, and a like amount each year for the two succeeding years, the investment during any one year over such proportionate amount for that year to be credited on the expenditure required for the ensuing year or years.

(b) Where, however, the lands involved are in an unproven territory, the portion of the total minimum investment required to be made during the first few years of the lease will be fixed in such amounts as the circumstances in each case require.

(c) A bond in the sum of \$5,000, executed by the lessee with approved corporate surety, and conditioned upon the making of the minimum investment required and upon compliance with the terms of the lease, will be required.

Section 5 of the regulations is amended by the addition of the following:

But in a case where the lands are in an unproven territory, the minimum production requirement may be made to begin at such time and to run for such periods as the Secretary may find warranted.

The situation known by the Department to exist with respect to the lands involved herein is one which warrants it in offering modified terms to this appellant.

The Commissioner's decision is, accordingly, modified to allow the appellant 15 days from notice within which to elect to accept a lease in the form prescribed in Circular No. 696, the departmental regulations of May 22, 1920, *supra*, except that sections (2a), (2b) and (2i) shall be as follows:

(2a) To invest in actual mining operations, development, or improvements upon the land leased, or for the benefit thereof, the sum of \$60,000, of which sum not less than \$5,000 shall be so expended during the first three years succeeding the execution of this instrument, not less than \$5,000 additional during the fourth year and not less than \$25,000 additional during each of the fifth and sixth years, respectively, unless sooner expended, and submit annually at the expiration of each year for the same period, an itemized statement of the amount and character of said expenditures during such year.

(2b) To furnish a bond in the sum of \$5,000, conditioned upon the expenditure of the amount specified herein (2a), and upon compliance with the other terms and provisions of this lease.

(2i) That, beginning with the seventh year of the lease, except when such operation shall be interrupted by strikes, the elements, or casualties not attributable to the lessee, the lessee shall mine each year and pay a royalty thereon, not less than 1,000 tons of phosphate rock from the leased premises, unless operations are suspended as provided in section 11 of the act.

If the terms proposed are not acceptable to him, he may, within the time allowed, file an application to amend his application to make it apply to one forty-acre tract only, as that is the largest area which the Department would be warranted in leasing in this territory upon the terms proposed by him. If he make a discovery of sufficient deposits to justify larger operations, he may apply to enlarge his lease, but would, in such case, run the risk of having such application rejected because of intervening applications for the contiguous lands. Unless an election is filed within the time allowed, appellant's application will be finally rejected.

The Commissioner's decision is modified to conform herewith, and the records returned to the General Land Office for the action directed herein.

### SAMUEL C. PURDY.

*Decided May 15, 1924.*

#### REPAYMENT—DESERT LAND—COAL LANDS—WITHDRAWAL.

An allowance of a desert-land entry for land withdrawn from entry under the coal land laws only is not erroneous, and its cancellation for failure of the entryman to submit proof rather than to prove the noncoal character of the land is not a ground for repayment under the act of June 16, 1880.

#### REPAYMENT—ENTRY—CONFIRMATION.

Under section 2 of the act of June 16, 1880, which provides for repayment where an entry has been erroneously allowed and can not be confirmed, the fact that an entry is incapable of confirmation is not alone sufficient, but its allowance must also have been erroneous.

#### DEPARTMENTAL DECISIONS CITED, APPLIED, AND DISTINGUISHED.

Case of William H. Irvine (28 L. D., 422) cited and applied; case of Thomas A. Sheppard (46 L. D., 261) cited and distinguished.

GOODWIN, *Assistant Secretary*:

Samuel C. Purdy has appealed from a decision of the Commissioner of the General Land Office dated December 24, 1923, denying repayment of moneys paid by Purdy in connection with his desert-land entry, Great Falls 02024. The entry was made July 29, 1907, and canceled by Commissioner's letter "G" of March 29, 1909, for failure to submit proof.

The record discloses that the land involved was withdrawn October 15, 1906, from filing or entry under the coal-land laws; also from any other filing, entry, or sale by departmental order of November 7, 1906, and modified to apply to coal entries merely on December 17, 1906; that it was restored to entry under the appropriate public-land laws by Commissioner's letter "N" of December 9, 1908. It accordingly appears that the entry was embraced within such coal-land withdrawal at the time the same was made.

In support of the application for repayment claimant has filed his affidavit to the effect that he allowed the entry to be canceled rather than defend the noncoal character of the land. In the decision complained of the Commissioner refused to accept such affidavit as sufficient evidence to establish the fact that entryman abandoned the entry because of the coal withdrawal, and for such reason he denied the application for repayment.

The record has been examined, and it is found that repayment is not warranted under the act of June 16, 1880 (21 Stat., 287). The allowance of the entry while the land was embraced in the coal withdrawal was not an erroneous one. By such withdrawal the land was only withdrawn from entry under the coal-land laws. If it should be argued that the entry could not be confirmed on account of the mineral character of the land shown *prima facie* by reason of such withdrawal, still repayment would not be due under said act for the reason that in order for repayment to be warranted under the provision in section 2 thereof, providing for repayment in cases where an entry has been erroneously allowed and can not be confirmed, the two conditions named therein must concur. In addition to being incapable of confirmation, the entry must have been erroneously allowed in the first instance. See William H. Irvine (28 L. D., 422).

The application for repayment can not be allowed under the rule announced in the case of Thomas A. Sheppard (46 L. D., 251), construing the provisions of the act of March 26, 1908 (35 Stat., 48), for the reason that it was not filed within the limitations of time provided by the act of December 11, 1919 (41 Stat., 366).

The decision appealed from is affirmed.

**LACHER v. MORT.***Decided May 17, 1924.***MORTGAGE—HOMESTEAD ENTRY—VESTED RIGHTS—RELINQUISHMENT—RECORDS.**

Where an entry is relinquished after the equitable title thereto has been earned and the county records show at date of relinquishment the existence of a mortgage, a trust will be declared against a subsequent entry for the benefit of the mortgagee to the extent of the mortgage.

**MORTGAGE—HOMESTEAD ENTRY—VESTED RIGHTS—PURCHASER—RELINQUISHMENT—NOTICE—RECORDS.**

The purchase of a relinquishment of an entry, the equitable title to which had been earned, for a mere fraction of its value, without consulting the records of the local office and the county records, gives rise to the suggestion of bad faith on the part of the purchaser and precludes the plea by him of ignorance of the existence of a mortgage, where those records contain sufficient data to put him on notice thereof.

**GOODWIN, Assistant Secretary:**

This is an appeal by Carl Lacher from a decision of the Commissioner of the General Land Office dated December 13, 1923, denying his application for the reinstatement of the original and additional homestead entries of William Hillert.

The original entry was made at the Dickinson, North Dakota, land office on June 20, 1911, and embraced SE.  $\frac{1}{4}$ , Sec. 1, T. 148 N., R. 104 W., 5th P. M. (160 acres). The additional entry under the enlarged homestead act was made January 14, 1914, for SE.  $\frac{1}{4}$  NE.  $\frac{1}{4}$  and lots 1 and 2, said Sec. 1, and SE.  $\frac{1}{4}$  SW.  $\frac{1}{4}$  and lots 4 and 7, Sec. 6, T. 148 N., R. 103 W., 5th P. M. (133.39 acres). Final proof on the combined entries was submitted June 29, 1918, from which it appears that residence was established in June, 1912, and thereafter maintained, and that in 1914 and 1915, 14 acres were cultivated; in 1916, 21 acres; 1917, 69 acres; and 1918, 70 acres. The improvements, valued at \$700, were listed as a frame house, barn, well, and 75 acres broken. With the final proof was filed an affidavit explaining why he had not been admitted to citizenship. The final proof was forwarded to the Commissioner of the General Land Office, who by decision dated November 6, 1918, held that it was satisfactory as to residence, cultivation, and improvements, and would be suspended until January 1, 1919, to await evidence of naturalization. By decision dated February 13, 1919, the Commissioner allowed Hillert further time within which to furnish the required evidence. Entryman was admitted to citizenship on May 16, 1921, and a certified copy of his certificate of naturalization was received at the General Land Office on June 29, 1921. No action was taken until December 30, 1921, when the Commissioner required entryman to file a new final affidavit and a corroborated affidavit showing to what extent he had cultivated the land since the sub-

mission of final proof. It does not appear that entryman was notified of said requirement. On November 13, 1922, entryman's relinquishment of both entries was filed, and at the same time Herbert J. Mort presented an application to make entry for all the land under the enlarged homestead act, which application was allowed the same day.

On July 13, 1923, Carl Lacher filed an application for the reinstatement of Hillert's entries, setting forth that in January, 1919, he loaned to said entryman the sum of \$1,200 for the purchase of farm machinery, taking as security a mortgage on the land embraced in the two entries; that the mortgage was recorded January 31, 1919, and that Mort knew of the mortgage when he made entry, and also knew that the mortgage had not been satisfied or released.

The application filed by Lacher bears evidence of service on both Hillert and Mort.

By decision dated September 11, 1923, the Commissioner of the General Land Office required Mort to show cause why his entry should not be canceled and the entries of Hillert reinstated. Mort made response, setting forth that immediately prior to November 13, 1922, he purchased the improvements on the land, which improvements consisted of a frame house, 12 by 14 feet,  $1\frac{1}{2}$  miles of three-wire fence on cedar posts, and about 103 acres of breaking, all of which breaking except about 49 acres had gone back to sod; that he paid to Hillert for said improvements the sum of \$270, part of which was paid in cash and the balance in promissory notes; that about the month of February, 1923, he moved onto the land, and has ever since resided thereon; that Hillert did not at the time of the sale of the improvements, or at any time prior to February, 1923, advise him of the execution of the mortgage, nor did he have such information from any other source; that Lacher advised him in February, 1923, of the existence of the mortgage, and admitted that he had failed to notify the local office of the mortgage. Further, that the negotiations for the purchase of the improvements were conducted at the Gardner coal mine, at Fairview, Montana; that there was no other person present, and that Hillert advised him that the reason for selling the improvements and relinquishing the entries was his inability to "complete his citizenship papers."

With the present appeal is an affidavit by Henry Dermtiter, who alleges that—

he was present in February, 1923, at a conversation between Carl Lacher and one Herbert Jefferson Mort in regard to a homestead entry made by the said Mort upon a tract of land formerly included in the homestead entries of William Hillert; that the said Mort, without being first advised thereof at the time by said Carl Lacher, or by any other person then present, of the existence of a

mortgage to said Lacher given upon the said entries of William Hillert, broached the subject of such mortgage by stating to said Carl Lacher that if he, the said Carl Lacher, had been smart and had filed notice of his mortgage in the proper office the said entry of said Mort therefor would not have been allowed.

If Mort had been acting in good faith, he would have inspected the records of the local office. He would have found on file there the various decisions of the Commissioner of the General Land Office, hereinbefore referred to, and would have found on the serial register a notation to the effect that by letter of June 25, 1921, the register had forwarded Hillert's certificate of naturalization. Moreover, he would have consulted the county records, and would there have found a record of the mortgage. That Hillert had resided on the land ever since 1912 must have been common knowledge throughout that portion of the county, and his willingness to relinquish almost 300 acres of land, about half of which was cultivable, after he had earned title thereto, for the sum alleged to have been paid by Mort, raises at once a suggestion of conspiracy to commit a fraud.

Moreover, in his final-proof testimony Hillert stated that he had mortgaged the land to Carl Lacher to secure the payment of \$3,450. Mort can not, in the face of such testimony, plead ignorance of the existence of a mortgage. He was bound by the notice so given.

The Department has repeatedly held that if an entryman has earned the equitable title to the land and the county records show, at the date of the relinquishment, the existence of a mortgage, a trust will be declared against a subsequent entry for the benefit of the mortgagee under the former entry, to the extent of the mortgage.

Ordinarily a hearing would be ordered, to develop the facts. But Mort's answer to the rule to show cause renders a hearing unnecessary. He has apparently proceeded on the assumption that Lacher's failure to file notice of the mortgage in the local office is fatal, and that by alleging ignorance of the existence of the mortgage his entry will be sustained. Neither defense is tenable. The relinquishment of the entries would have been suspended until Lacher had been notified, if notice of the mortgage had been on file; but the mortgagee's failure to file such notice can not be held to redound to the benefit of Mort. The county records and the records of the local office were notice to everybody, and Mort can not be held to have acted in good faith when he failed to consult such records.

The record as now made up is sufficient to warrant the Department in requiring Mort to satisfy the mortgage, under penalty of cancellation of his entry in default of such satisfaction. He will be required to pay the principal together with the legal interest. Thirty days from receipt of notice, to be issued by the local officers after this decision has been declared final, will be allowed Mort within which to

show that such payment has been made, and in default thereof his entry will be canceled and the entries of Hillert reinstated.

The decision appealed from is modified to agree with the foregoing.

### CHARLES A THIELEN.

*Decided May 19, 1924.*

CHIPPEWA LANDS—INDIAN LANDS—HOMESTEAD ENTRY—TIMBER LAND—RELINQUISHMENT—PURCHASE—PAYMENT.

Section 27 of the act of June 25, 1910, which provides for the sale of the pine timber on Chippewa Indian lands, does not require the collection of the appraised price of the timber on an entry more than once.

GOODWIN, *Assistant Secretary*:

Charles A. Thielen made homestead entry 018085, September 19, 1923, under section 2289, Revised Statutes, for the W.  $\frac{1}{2}$  SE.  $\frac{1}{4}$ , SW.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ , SE.  $\frac{1}{4}$  NW.  $\frac{1}{4}$ , Sec. 3, T. 158 N., R. 34 W., 5th P. M., containing 160 acres, Crookston land district, Minnesota.

The described land is Chippewa Indian land, and the entry was made subject to the provisions of the act of May 20, 1908 (35 Stat., 169). It appears that by decision of December 20, 1923, the Commissioner of the General Land Office held the entry for cancellation as to the NW.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , SW.  $\frac{1}{4}$  NE.  $\frac{1}{4}$  and SE.  $\frac{1}{4}$  NW.  $\frac{1}{4}$ , upon the ground that the charge for timber on the NW.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , amounting to 2,500 feet of Norway pine, valued at \$10, had not been paid, as required by section 27 of the act of June 25, 1910 (36 Stat., 855).

By letter dated January 28, 1924, treated as an informal appeal, Thielen states that a former entryman (Henry D. Rohner), who made homestead entry 017279, December 27, 1919, and relinquished said NW.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , Sec. 3, in his favor September 19, 1923, paid the timber charge on said tract, and was issued receipt therefor, No. 2352238, December 27, 1919. In this he is corroborated by the register of the local office, who states, under date of February 1, 1924, that the former entryman (Rohner) paid the sum of \$22 for the pine on his entry, which is covered by the above-numbered receipt issued by the local office; that presumably this included the pine on the tract relinquished by Rohner.

Examination of the record in the case of Henry D. Rohner, 017279, discloses that he paid \$10 for the timber on said NW.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , Sec. 3, at the time his application was allowed, and \$12 for the timber on the SE.  $\frac{1}{4}$  SE.  $\frac{1}{4}$  of said section; that these were the only subdivisions in the Rohner entry which contained timber.

There is no provision in said act of June 25, 1910, section 27 of which provides for the sale of the pine timber on Chippewa Indian lands, requiring the collection of the appraised price of the timber on an entry more than once.

The decision appealed from is accordingly reversed.

**W. J. CARNEY.***Decided May 20, 1924.***NATIONAL FORESTS—RELINQUISHMENT—ACT OF SEPTEMBER 22, 1922—STATUTES.**

The act of September 22, 1922, which provides for an exchange of national forest lands, does not contemplate a forced exchange, but authorizes the execution of a quitclaim deed where the former owner of the base land, after relinquishing it, declines to make the exchange.

**NATIONAL FORESTS—RELINQUISHMENT—ACT OF SEPTEMBER 22, 1922—STATUTES.**

The act of September 22, 1922, being a remedial statute, should be liberally construed so that its benefits may be extended to all those who come fairly within its scope.

**FINNEY, *First Assistant Secretary:***

W. J. Carney has appealed from the decision of the Commissioner of the General Land Office dated October 9, 1923, rejecting his application for a quitclaim deed of base land conveyed to the United States prior to the repeal of the forest lieu selection act.

On August 15, 1923, the attorney of W. J. Carney filed, pursuant to the act of September 22, 1922 (42 Stat., 1017), an application for a deed reconveying the SW.  $\frac{1}{4}$ , and NW.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , Sec. 25, T. 63 N., R. 4 W., B. M., Idaho, which he had transferred to the United States on April 30, 1902, the tracts then being in the Priest River Forest Reserve. It is stated that Mr. Carney intended to make forest lieu selections but before he had opportunity to do so the repealing act of March 3, 1905 (33 Stat., 1264), was passed and that now he is not in a position to undertake an exchange of these lands and finds it more to his advantage to have title reconveyed. An abstract of title was furnished which showed that the entire section was patented on December 9, 1901, to the Northern Pacific Railway Company, which by warranty deed of March 20, 1902, conveyed the same to W. J. Carney, who with his wife, on April 30, 1902, by warranty deeds transferred the two tracts described to the United States. The applicant requested that a deed in his favor be perfected and delivered.

The act of September 22, 1922, is a relief measure and provides that where any person in good faith relinquished to the United States lands in a national forest and failed to get lieu selections—

the Secretary of the Interior, with the approval of the Secretary of Agriculture, upon application of such person or persons, their heirs or assigns, is authorized to accept title to such of the base lands as are desirable for national-forest purposes, which lands shall thereupon become parts of the nearest national forest, and, in exchange therefor, may issue patent for not to exceed an equal value of national-forest land, unoccupied, surveyed, and nonmineral in character, or the Secretary of Agriculture may authorize the grantor to cut and remove an equal value of timber within the national forests of the same State. Where an exchange can not be agreed upon the Commissioner of the General Land Office is hereby authorized to relinquish and quitclaim to such person or persons, their heirs or assigns, all title to such lands which the

respective relinquishments of such person or persons may have vested in the United States:

Paragraph 13 of the instructions of December 30, 1922 (49 L. D., 383, 389), under said act, in part is as follows:

Where the applicant and the forest officers can not agree upon an exchange in accordance with section 1 of said act of September 22, 1922, and where the lands relinquished have not been disposed of by the United States or appropriated to a public use other than the general purposes for which the forest reserve within the bounds of which they are situated was created, upon due proof of that fact, to consist of the letters of the forest officers and the affidavit of the applicant, accompanied by the required abstract of title showing relinquishment of the lands to the United States, under the said act of June 4, 1897, the Commissioner of the General Land Office will, in proper cases, relinquish and quitclaim to the person or persons who thus relinquished to the United States, their heirs or assigns, all title to such lands which the respective relinquishments of such person or persons may have vested in the United States. A copy of such relinquishment and quitclaim and the abstract of title will be filed in the General Land Office.

The Commissioner held that a quitclaim deed would be made only where the applicant and the forest officers could not agree upon an exchange, and that upon due proof of such fact consideration would be given to the letters of the forest officers and the affidavits of the applicant. The application was rejected because such proof was not filed.

The appellant contends that the Commissioner erred and urges that the applicant's statement that he does not desire an exchange should be held to be sufficient evidence that an exchange can not be agreed upon, and that an applicant has as much right to refuse to exchange as the Government has to refuse to allow him to exchange.

In view of the contentions of the appellant, the statute has been examined with care. It is found that as originally drafted section 1 of the bill, H. R. 8119, 67th Congress, 1st session, contained no provision for an exchange but provided only for a quitclaim of title to the base lands surrendered by the claimant. The exchange provisions of that section were introduced by an amendment proposed by the Department of Agriculture. See House Report No. 410 upon said bill. It will be noted that in an exchange the selector is limited to national-forest land of equal or lesser value or to an equal value of timber within the national forests of the same State. The base lands become parts of the nearest national forest when title is accepted. Authority to accept title to such lands is conferred upon the Secretary of the Interior only where the Secretary of Agriculture gives his approval, where the claimant of the base land makes application for an exchange, and where the lands are desirable for national-forest purposes. The second condition is just

as essential in connection with an exchange as are the other two conditions specified. The application of the claimant for an exchange is fundamental. Without it there is no basis upon which to proceed.

It is provided that "where an exchange can not be agreed upon" the Commissioner is authorized to quitclaim. Obviously, where an exchange is sought and the Department of Agriculture declines to give its approval, there will be no agreement and a quitclaim is authorized. But an exchange presupposes that two parties are involved who have mutually agreed to consummate a trade of properties. Where either party refuses his consent there can be no exchange. So where one party wholly declines and refuses to apply for an exchange, it may very well be said that an exchange can not be agreed upon. Actual negotiations resulting in disagreement are not exclusively essential to such a condition.

The act is entitled "An Act for the relief of certain persons, etc." The statute was designed to be remedial. A liberal rather than a narrow or technical construction should be invoked so that the benefits of the act may be extended to all those who come fairly within its scope. It is clear that the primary purpose of the bill as originally drafted was to authorize a quitclaim deed of the base lands so as to restore to the claimant the apparent outstanding title which his deed upon the local records purported to convey to the United States. In certain cases such as is here presented deeds were executed and recorded but no forest lieu applications were filed. In other cases selections were sought but were rejected. The title to the base lands was never claimed or accepted on behalf of the Government in these cases, and notwithstanding such recorded deeds the Government disclaimed ownership of the land. It was to remedy this anomalous situation that the bill was drafted. The exchange provisions of section 1 were enacted so that under the circumstances specified therein the base lands should become a part of the national forest.

The Department is disposed to view this statute in the light of the conditions which existed and which needed a remedy. Prior to its enactment there was no authority in the Land Department to execute a quitclaim deed for these base lands. An exchange when consummated under the act is necessarily pursuant to an application and a mutual agreement. The statute does not contemplate a forced exchange. (The Department is of the opinion that in a case where the claimant of the base land openly announces that he does not desire an exchange and declines to apply for one it must be held that an exchange can not be agreed upon and that, all else being regular, a quitclaim deed is authorized.)

In the present record the claimant did not sign the application nor is there any written authorization for the attorney to make the ap-

plication for him. The abstract of title was made at the request of one G. E. Crocker. The good faith of the parties is not here questioned, but it is desirable that the record show that the person seeking a deed made or authorized the application.

For the reasons above set forth the Commissioner's decision upon the question involved in the appeal is reversed and the case remanded for appropriate action.

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**HERMAN KRUEDING AND ELIZABETH SCHMIDT (ON RECONSIDERATION).**

*Decided May 20, 1924.*

**SURVEY—COMMISSIONER OF THE GENERAL LAND OFFICE—SECRETARY OF THE INTERIOR—SUPERVISORY AUTHORITY.**

Pursuant to the supervisory power over the public lands vested in the Secretary of the Interior by section 441, Revised Statutes, that officer is clothed with the authority to cancel a survey executed under the direction of the Commissioner of the General Land Office, which, in the opinion of the former, was unauthorized.

**WARRANT—SCRIP—PRIVATE ENTRY—SURVEY.**

By section 2415, Revised Statutes, the location of a military bounty land warrant was restricted to legal subdivisions of public lands of the United States, subject to private entry.

**PRIVATE ENTRY—SURVEY—NOTICE—PURCHASE.**

Prior to the subjection of public lands to private entry four preliminary steps were required by the statutes: (a) survey into legal subdivisions; (b) a proclamation by the President exposing the lands to public sale; (c) publication of notice of sale; (d) offering at public outcry by the register of the United States land office of the district in which the lands were situated; and the lands remaining undisposed of at the close of such sale thereafter became subject to private entry.

**COURT DECISION CITED AND APPLIED—PRIOR DEPARTMENTAL DECISIONS ADHERED TO.**

Case of *Knight v. United States Land Association* (142 U. S., 161) cited and applied; cases of *John Farson* (2 L. D., 338), *George W. Streeter et al.* (21 L. D., 131), and *Harvey M. LaFollette* (26 L. D., 453) adhered to.

**WORK, Secretary:**

Herman Krueding has filed a motion for reconsideration of the decision of the Commissioner of the General Land Office, approved by the First Assistant Secretary, January 22, 1924, in the *ex parte* case of Herman Krueding and Elizabeth Schmidt, applicants for patent for the tract known as the Chicago Lake Front.

The land involved is unsurveyed, and is situated on Lake Michigan, in Chicago, Cook County, Illinois. It is between the meanders of the fractional north half of section 10, T. 39 N., R. 14 E., 3rd P. M., and the present shore line of Lake Michigan. Fractional T. 39 N., R. 14 E., was surveyed in the field by John Walls during the year 1821, and the township plat approved March 16, 1831. The

plat exhibits the entire fractional township as abutting on the waters of Lake Michigan. Among other sections rendered fractional by the lake are 3, 10, and 15. The Chicago River is shown on the plat as entering the lake near the middle of fractional section 10. The area of that part of the section north of the river is given as 102.29 acres, and the part south as 57.52 acres. All the land in fractional section 10, shown on the plat of 1831 as north of the Chicago River, was patented to Robert A. Kenzie, under the pre-emption law, on March 9, 1837. The land now applied for is therefore located between the patented Kenzie tract and the waters of Lake Michigan.

As early as 1838, and on numerous subsequent occasions, efforts were made to secure title to alleged public lands situated between the meanders of sections 3, 10, 15 and Lake Michigan, and it has uniformly been held by this Department that the areas so applied for were not public lands of the United States, and all such applications have been denied. Referring to such efforts, Secretary Teller, June 8, 1883, in the case of John Farson (2 L. D., 338, 339), said:

From the cases which I have already referred to, and the opinions which have prevailed respecting the character of this land, from the time of Commissioner Whitcomb's letter in 1838 to the present, it would seem that it ought to be understood by this time that the tract in question, including that part of it which lies opposite to Sec. 10, is not public land of the United States, and therefore not the subject of any scrip location whatever.

Notwithstanding the repeated holdings of the Department that the lands formed between the meander and the shore line of Lake Michigan opposite sections 3, 10, and 15, were not public, George W. Streeter and Peter T. Johnston, on May 5, 1895, filed homestead applications for the tract now in controversy. The applications were rejected by the Commissioner of the General Land Office for the reason that the tract "is not public land and is not subject to disposal by the United States." Streeter and Johnston appealed, and the Acting Secretary, August 31, 1895, in *Geo. W. Streeter et al.* (21 L. D., 131), affirmed the decision of the Commissioner, stating:

Without discussing the question of the true ownership of the made or filled in lands formerly covered by the waters of the lake, it is sufficient to say that such lands do not belong to the Government, and, therefore, this Department has no jurisdiction to direct their survey or disposal.

The status of the tract was again brought to the attention of the Department in the case of Harvey M. LaFollette *et al.* (26 L. D., 453) and Secretary Bliss, on April 2, 1898, in an elaborate opinion, again held that the tract is not public land of the United States, and for that reason canceled, annulled, and set aside a survey of the land that

had been executed under the direction of the Commissioner of the General Land Office during the year 1896, and declared such survey "to be of no effect."

Krueding and Schmidt based their application upon the claim that the land was located on January 11, 1894, by Peter T. Johnston, of Chicago, Illinois, under military bounty land warrant No. 88684, 160 acres, act of March 3, 1855 (10 Stat., 701); that Johnston conveyed the land and the warrant to Barbara Schneider, who, to avoid taxes, failed to place the deed of record, and that Johnston thereafter improperly regained possession of such deed and warrant. Elizabeth Schmidt, who is the daughter and alleged sole heir of Barbara Schneider, by quit-claim deed, for the recited consideration of one dollar, conveyed an equal undivided one-half interest to Herman Krueding.

The application was denied January 22, 1924; First, because the area involved is not public land of the United States; Second, the land, even if public, is not and never has been subject to location under military bounty land warrant No. 88684, or any other bounty land warrant; Third, while Peter T. Johnston was the owner of the land warrant, he did not locate it, nor attempt to locate it, on the land in question, but sold and assigned the warrant to another person; and Fourth, Herman Krueding and Elizabeth Schmidt have no right, title and interest in and to the warrant.

It was further held that Johnston, after filling in the blank on the warrant—

To the Register of the Land Office at Washington, D. C., January 11, 1894: Locate this certificate in the unsurveyed public lands lying immediately east of and adjoining the north one half of fractional Section ten, Township thirty nine North, Range fourteen East, of the Third Principal Meridian, State of Illinois,

merely filed the warrant so noted with the Recorder of Deeds of Cook County, Illinois, and did not present it with the required fees to the Commissioner of the General Land Office. As Johnston subsequently assigned the warrant to Angus J. Conoly, who located it on lands within the Gainesville, Florida, land district, the notation above quoted was misleading, and the Commissioner, under the authority of the Department, in his letter of January 25, 1924, advised Krueding that there had been endorsed on the warrant the following:

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

*Washington, January 25, 1924.*

This warrant was not located nor offered for location on the unsurveyed land situated immediately east of and adjoining the N.  $\frac{1}{2}$ , Sec. 10, T. 39 N., R. 14 E., 3rd P. M., nor was it located on any land in the State of Illinois. The warrant was assigned by Peter T. Johnston to Angus J. Conoly and

located on the W.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ , SE.  $\frac{1}{4}$  NW.  $\frac{1}{4}$  and NE.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , Sec. 10, T. 8 S., R. 8 E., Gainesville, Florida, land district.

WILLIAM SPRY,

*Commissioner.*

Krueding insists, in the motion under consideration, that Johnston located the warrant on January 11, 1894, and conveyed all interest therein to Barbara Schneider, and charges that Johnston stole the warrant from Barbara Schneider after its delivery to her; he admits that the land was unsurveyed in 1894, and urges that the description by metes and bounds was the best that could be given under the circumstances; he questions the authority of Secretary Bliss to cancel the survey executed under the direction of the Commissioner of the General Land Office in 1896; and objects to the notation made on the warrant by the Commissioner on January 25, 1924.

The finding that Johnston did not on January 11, 1894, nor at any other time, offer the warrant for location on the tract in question, was amply warranted. The act approved July 31, effective September 30, 1876 (19 Stat., 102, 121), abolished the Springfield land office, the last in the State of Illinois, and pursuant to the provisions of the act approved March 3, 1877 (19 Stat., 294, 315), the public lands in the State of Illinois became subject to entry at the General Land Office under the laws applicable thereto. Any application for public land in the State of Illinois should have been filed after March 3, 1877, in the General Land Office, but there is nothing whatever in the files, indices, letter books, warrant books, or in the record of the so-called Chicago Lake Front case, to indicate that Peter T. Johnston on January 11, 1894, or at any other time, located or attempted to locate military bounty land warrant No. 88684 on the land involved in the application of Krueding and Schmidt.

The warrant bears evidence that it was in Lucas County, Ohio, January 8, 1894; in Belmont County, Ohio, January 9, 1894; and in Chicago, Illinois, on January 11 and 12, 1894. It could not, therefore, have been filed in the General Land Office on January 11, 1894. No one states that he saw Johnston tender the warrant to any officer in the General Land Office on such date, and Johnston during his lifetime made no claim that he ever located or attempted to locate the warrant.

The claim that Johnston sold the land and the warrant to Barbara Schneider was not established, and there is no basis whatever for the charge that he stole the warrant from Barbara Schneider after its alleged delivery to her. But, if it be admitted that Johnston offered the warrant for location on January 11, 1894; that he thereafter sold and delivered the warrant to Barbara Schneider, and stole it from her as charged, the application for patent is without merit. The

land was not subject to location under any military bounty land warrant, and if Johnston tendered the warrant it was properly refused. He gained no right whatever by such tender, and therefore conveyed nothing to Barbara Schneider, if in fact he executed and delivered the alleged deed.

Military bounty land warrants were subject to location only by legal subdivisions on public lands of the United States subject to private entry at the minimum price (section 2415, Revised Statutes). Four steps were necessary before public lands of the United States became subject to private entry. First, a survey of the land as provided in Chapter 9, sections 2395-2413, Revised Statutes; Second, the proclamation of the President exposing the lands to public sale (section 2358, Revised Statutes); Third, the advertisement of the notice of such sale for the period of not less than three nor more than six months (section 2359, Revised Statutes); and Fourth, the offering of the tracts at public outcry by the register of the land office where the lands were situated, at not less than \$1.25 per acre. If the lands so offered failed to secure a purchaser at \$1.25 per acre or a higher price, and remained undisposed of at the close of such sale, they thereafter became subject to private entry at the minimum price, as provided in section 2357, Revised Statutes. Not one of the four several steps necessary to render the tract under consideration subject to private entry has been taken. The land, therefore, was not subject to private entry on January 11, 1894, and no military bounty land warrant could have been lawfully located thereon.

There is no doubt whatever of the authority of Secretary Bliss to cancel and annul the survey executed under the direction of the Commissioner of the General Land Office during the year 1896. An identical question was presented to the Supreme Court in the case of *Knight v. United States Land Association* (142 U. S., 161), and the court fully sustained the right and authority of the Secretary to cancel a survey which in his opinion was unauthorized.

The notation made on warrant No. 88684 by the Commissioner of the General Land Office on January 25, 1924, was authorized by the Department and was fully warranted by the facts.

No reason whatever is advanced for reversing the consistent rulings of the Department during the last eighty years that the tract involved is not public land of the United States. The motion for reconsideration is wholly without merit; is accordingly denied; and the case closed. All papers filed in support of the application or the motion for reconsideration will be returned to the applicants.

*Effect practically allowable  
Affection, Page 184*

## STATUTES AND REGULATIONS GOVERNING ENTRIES AND PROOFS UNDER THE DESERT LAND LAWS

(CIRCULAR NO. 474)

(In this revision of the Regulations of May 18, 1916 (45 L. D. 345), changes have been made in paragraphs 2, 3, 4, 5, 8, 9, 11, 13, 14, 15, 16, 18, 21, 22, 28, 30, 31, 32, 34, 35, 36, 41, and 51.)

DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE,  
Washington, D. C., May 20, 1924.

1. All the more important laws and portions of laws governing the making of desert-land entries, assignments thereof, and the proofs required, will be found printed in full at the end of this circular.

It seems to be the purpose of the statutes to encourage and promote the reclamation, by irrigation, of the arid and semiarid public lands of the Western States through individual effort and private capital, it being assumed that settlement and occupation will naturally follow when the lands have thus been rendered more productive and habitable.

Such reclamation is often a difficult and expensive undertaking, and desert-land entrymen sometimes find serious difficulty in complying with all the requirements of the law, particularly persons who possess little capital. All claimants should restrict their entries to only that quantity of land which they can reasonably expect to reclaim, even though such area be much less than may be lawfully entered. As the more accessible and easily appropriated streams become exhausted, it becomes necessary to convey water, often for very long distances, from more remote sources of supply; more elaborate and expensive systems of irrigation works are required, the cost of water rights is correspondingly increased, and individuals consequently find it necessary to unite their efforts in various forms of cooperative enterprise in order to secure the necessary capital. Nevertheless, a small tract of land, thoroughly reclaimed, with an adequate water supply obtained from a large, well-constructed irrigation system, may well be considered a very valuable piece of property, and more desirable than a larger tract only partially reclaimed or reclaimed from a small, private irrigation system less permanent and efficient in character.

*See page waters 133 Pacific 1107 275 Fed 885-  
206 Pacific 393 | 191 Pacific 129 262 U.S. 138  
279 Pacific 44 | 287 Pacific 129 269 Fed 80*

**ENTRIES AND PROOFS UNDER THE DESERT LAND LAWS—STATES IN WHICH DESERT-LAND ENTRIES MAY BE MADE**

2. The act of March 3, 1877, as amended by the act of March 3, 1891, provides for the making of desert-land entries in the States of Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, North Dakota, Oregon, South Dakota, Utah, Washington, and Wyoming.

**LANDS THAT MAY BE ENTERED AS DESERT LAND**

3. As the desert-land law requires the artificial irrigation of any land entered thereunder, lands which are not susceptible of irrigation by practicable means are not deemed subject to entry as desert lands. The question as to whether any particular tract sought to be entered as desert land is in fact irrigable from the source proposed by the applicant will be investigated and determined before the application for entry is allowed. (See par. 13 of this circular.) In order to be subject to entry under the desert-land law, public lands must be not only irrigable but also surveyed, unreserved, unappropriated, nonmineral (except lands withdrawn, classified or valuable for coal, phosphate, nitrate, potash, oil, gas, or asphaltic minerals, as hereinafter set forth), nontimbered, and such as will not, without artificial irrigation, produce any reasonably remunerative agricultural crop by the usual means or methods of cultivation. In this latter class are those lands which, one year with another for a series of years, will not without irrigation produce paying crops, but on which crops can be successfully grown in alternate years by means of the so-called dry-farming system. (37 L. D. 522 and 42 L. D. 524.)

Under the act of June 22, 1910 (36 Stat. 583), lands which have been withdrawn or classified as coal lands, or are valuable for coal, may, if desert in character as above defined, be entered under the desert-land law, provided such entry is made with a view to obtaining title with a reservation to the United States of the coal in such lands and of the right to prospect for, mine, and remove the same. By the act of July 17, 1914 (38 Stat. 509), similar provisions are made with respect to all lands which have been withdrawn, classified, or reported as containing phosphate, nitrate, potash, oil, gas, or asphaltic minerals, or which are valuable for those deposits.

Applications to make desert-land entries of lands embraced in applications, permits, or leases under the act of February 25, 1920 (41 Stat. 437), if in all other respects complete, will be treated in accordance with departmental instructions authorized by section 29 of said act. (See Instructions of October 6, 1920; 47 L. D. 474.) Applications to make desert-land entries of lands within a naval petroleum reserve must be rejected, as no desert-land entry may be allowed for such lands.

**WHO MAY MAKE DESERT-LAND ENTRY**

4. Any citizen of the United States 21 years of age, or any person of that age who has declared his intention of becoming a citizen of the United States, and who can truthfully make the affi-

*Resident citizen 5/20/40*

davit specified in paragraphs 8 and 9 of these regulations, can make a desert-land entry. Thus, a woman, whether married or single, who possesses the necessary qualifications can make a desert-land entry, and, if married, without taking into consideration any entries her husband may have made.

Under existing law (act of September 22, 1922; 42 Stat. 1022), a native-born woman does not lose her citizenship by marriage to an alien unless he be ineligible to become a citizen of the United States; nor does a woman of alien birth acquire citizenship by marriage to a citizen of the United States. The marriage of an alien woman to a citizen of the United States takes the place of a declaration of intention. Under the act of March 2, 1907 (34 Stat. 1228), the citizenship status of the wife is declared to be that of the husband. Any woman seeking to make a desert-land entry, therefore, must show whether she is married or single, and, if married, must give the date of her marriage and the citizenship of her husband. If married between the dates herein specified, and her husband is naturalized or has declared his intention to become a citizen, or if the marital relation has ceased to exist, she may show that fact and, also, that she has resumed her American citizenship by one of the methods prescribed by the act of March 2, 1907. If after initiating a claim under the desert-land laws a woman marries, she must show at time of submission of final proof whether or not her husband is eligible to become a citizen of the United States.

A certified copy of the certificate of naturalization or declaration of intention, as the case may be, should accompany the application in every instance where required by the foregoing rules.

At the time of making final proof claimants of alien birth must have been admitted to citizenship, but a certified copy of the certificate of naturalization need not be furnished if it has already been filed in connection with the original declaration or with the proof of an assignment of the entry.

#### QUANTITY OF LAND THAT MAY BE ENTERED — See page 483

5. Under the act of March 3, 1877, desert-land entries to the maximum of 640 acres were allowed, but by the act of March 3, 1891, the maximum area that may be embraced in a desert entry was reduced to 320 acres. This limitation must, however, be read in connection with the act of August 30, 1890 (26 Stat. 391), which limits to 320 acres, in the aggregate, the amount of land to which title may be acquired under all the public land laws, except the mineral laws, and the amendment thereof by the act of February 27, 1917 (39 Stat. 946), allowing one who has entered 320 acres under the enlarged homestead laws to make a desert-land entry. Hence, a person having initiated a claim under the homestead, timber and stone, preemption, or other agricultural land laws, or under all such laws, since August 30, 1890, say, to 160 acres in the aggregate, or 320 acres under the enlarged homestead act, and acquired title to the land so claimed, or who is claiming such an area under subsisting entries at the date of his desert-land application, may, if otherwise qualified, enter 160 acres of land under the desert land laws. In other words, he may have a desert-land entry for such

a quantity of land as, taken together with all land acquired and claimed by him under the other agricultural land laws since August 30, 1890, does not exceed 320 acres in the aggregate, or 480 acres if he shall have made an enlarged homestead entry of 320 acres. It is to be noted also that the act of June 22, 1910 (36 Stat. 583), provides that desert-land entries made for lands withdrawn or classified as coal lands, or valuable for coal, shall not exceed 160 acres in area, and that a like restriction is made by the act of July 17, 1914 (38 Stat. 509), with reference to desert-land entries made for land withdrawn, classified, or reported as containing phosphate, nitrate, potash, oil, gas, or asphaltic minerals, or valuable for those deposits.

Entry of lands within an irrigation district which the Secretary of the Interior has approved under the act of August 11, 1916 (39 Stat. 506), is limited to 160 acres. A special circular is issued under this act. (Circular No. 592, approved March 6, 1918; 46 L. D. 307.)

See 50 L. D. 135

#### SECOND ENTRY

A person's right of entry under the desert land law is exhausted either by filing an allowable application and withdrawing it prior to its allowance or by making an entry or by taking an assignment of an entry, in whole or in part, except, however, that under the act of September 5, 1914 (38 Stat. 712), if a person, otherwise duly qualified to make a desert-land entry, has previously filed an allowable application or made such entry or entries and through no fault of his own has lost, forfeited, or abandoned the same, such person may make another entry. In such case, however, it must be shown that the prior application, entry, or entries were made in good faith, and were lost, forfeited, or abandoned because of matters beyond the applicant's control, and that the applicant has not speculated in his right, nor committed a fraud or attempted fraud in connection with such prior entry or entries. As the assignment of an entry involves no loss, forfeiture, or abandonment thereof, but carries a benefit to the assignor, it is held to exhaust his right of entry under the desert land law. Hence, no person who has assigned such entry, in whole or in part, will be permitted thereafter to make another entry or to take one or any part thereof by assignment. Applications to make second entry must not be allowed by the registers and receivers, but must be forwarded by them, with appropriate recommendations, to the General Land Office, accompanied by the applicant's affidavit giving data from which his former application, or applications, entry, or entries may be identified (preferably its series and number, as well as a description of the tract by section, township, and range), and showing (a) what examination of the land and what inquiries as to its character he made prior to filing his previous application or applications for entry, and what reason he had to believe that the required proportion of the tracts could be reclaimed by him through irrigation; (b) what improvements he made upon the land, describing in detail their nature and cost, the date of his abandonment of the claim or claims and the reason therefor, and whether he ever executed a relinquishment of the entry or entries; and (c) what consideration, if any, he received for abandoning or relinquishing the entry or entries, and whether he

sold the improvements thereon, giving full details as to such sale, if any, including the date thereof and the consideration received. This affidavit must be executed before a proper officer (see par. 11 of this circular) and must be corroborated on all matters susceptible of corroboration by at least one witness having knowledge of the facts; or, there may be several witnesses, each testifying on some material point. The affidavits of the witnesses may be executed before any officer authorized to administer oaths and having an official seal.

If the commissioner should find that the applicant is qualified to make a second entry, the application will be returned to the local officers for appropriate action in accordance with paragraph 13 of this circular.

#### LAND MUST BE IN COMPACT FORM

6. Land entered under these laws should be in compact form, which means that it should be as nearly a square form as possible. Where, however, it is impracticable, on account of the previous appropriation of adjoining lands or on account of the topography of the country, to take the land in a compact form, all the facts regarding the situation, location, and character of the land sought to be entered and the surrounding tracts should be stated, in order that the General Land Office may determine whether, under all the circumstances, the entry should be allowed in the form sought. Entry men should make a complete showing in this regard and should state the facts and not the conclusions they derive from the facts, as it is the province of the Land Department of the Government to determine whether or not, from the facts stated, the entry should be allowed. Under no circumstances, however, can one entry be made for two or more separate tracts or for two tracts which touch each other at only a single point.

#### HOW PREFERENCE RIGHT MAY BE ACQUIRED ON UNSURVEYED LAND

7. Prior to the act of March 28, 1908, a desert-land entry could embrace unsurveyed lands, but since the date of that act desert-land entries may not be made of unsurveyed lands. This act provides, however, that any individual qualified to make entry of desert lands under the desert-land acts who has, prior to survey, taken possession of a tract of unsurveyed desert land not exceeding in area 320 acres in compact form, and has reclaimed or has in good faith commenced the work of reclaiming the same, shall have the preference right to make entry of such tract under said acts, in conformity with the public-land surveys, within 90 days after the filing of the approved plat of survey in the district land office.

To preserve this preference right the work of reclamation must be continued up to the filing of the plat of survey, unless the reclamation of the land is completed before that time, and in that event the claimant must continue to cultivate and occupy the land until the survey is completed and the plat filed. A mere perfunctory occupation of the land, such as staking off the claim or posting notices thereof on the land claimed, will not secure the preference right as against an adverse claimant. While actual settlement and residence upon the land, as required under the homestead law, are not neces-

sary, the possession and improvements must be such as to conform to the requirements of the desert-land law and must evidence good faith on the part of the claimant.

#### HOW TO PROCEED TO MAKE A DESERT-LAND ENTRY

*One holding more than 320 acres disqualified - page 560*

8. A person who desires to make entry under the desert land laws must file with the register and receiver of the proper land office a declaration or application, under oath, showing that he is a citizen of the United States, or has declared his intention to become such citizen; that he is 21 years of age or over; and that he is also a bona fide resident of the State in which the land sought to be entered is located, except in the State of Nevada, where the qualification as to citizenship is that of the United States only (41 Stat. 1086). He must also state that he has not previously exercised the right of entry under the desert land laws by filing an allowable application and withdrawing it prior to its allowance or by making an entry or by having taken one by assignment; that he has personally examined every legal subdivision of the land sought to be entered; that he has not, since August 30, 1890, acquired title, under any of the agricultural land laws, to lands which, together with the land applied for, will exceed in the aggregate 320 acres, or 480 acres in case he has made an enlarged homestead for 320 acres; and that he intends to reclaim the lands applied for by conducting water thereon within four years from the date of his application. This declaration must contain a description of the land by legal subdivisions, section, township, and range. If the application is made for lands, withdrawn or classified as coal lands or for lands withdrawn, classified, or reported as containing phosphate, nitrate, potash, oil, gas, or asphaltic minerals, or valuable therefor, the applicant must also state in his declaration that the same is made in accordance with and subject to the act of June 22, 1910 (36 Stat. 583), or the act of July 17, 1914 (38 Stat. 509), as the case may be.

As to lands embraced in applications, permits, or leases under the act of February 25, 1920, see paragraph 3 of this circular.

9. Special attention is called to the terms of this application, as they require a personal knowledge by the entryman of the lands intended to be entered. The affidavit, which is made a part of the application, may not be made by an agent or upon information and belief, and the register and receiver must reject all applications in which it is not made to appear that the statements contained therein are made upon the applicant's own knowledge, obtained from a personal examination of the land. The blank spaces in the application must be filled in with a complete statement of the facts showing the applicant's acquaintance with the land and how he knows it to be desert land. This declaration must be corroborated by the affidavits of two reputable witnesses, who also must be personally acquainted with the land, and they must state the facts regarding the condition and situation of the land upon which they base the opinion that it is subject to desert entry. The declaration of applicant and the affidavit of his two witnesses must in every instance be made at the same time and place and before the same officer. (As to officers authorized to administer oaths in such cases, see par. 11 of this circular.)

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*Heirs of desert land claimant*

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The statements in the blank form of declaration and accompanying affidavits as to present character of the land may be modified so as to show the facts in any case wherein application is made for entry of lands reclaimed or partially reclaimed, by applicant, before survey, under the provisions of the act of March 28, 1908; as to a former application or entry, in case application is made for a second entry under the provisions of the act of September 5, 1914; as to the character of the land with respect to coal deposits in case application is made under the provisions of the act of June 22, 1910, for lands withdrawn or classified as coal lands, or valuable for coal; and with respect to phosphate, nitrate, potash, oil, gas, and asphaltic minerals in case application is made under the provisions of the act of July 17, 1914, for lands withdrawn, classified, or reported as containing those substances, or valuable therefor.

As to lands embraced in applications, permits, or leases under the act of February 25, 1920, see paragraph 3 of this circular.

10. Applicants and witnesses must in all cases state their places of actual residence, their business or occupation, and their post-office addresses. It is not sufficient to name only the county or State in which a person lives, but the town or city must be named also; and where the residence is in a city the street and number must be given. It is especially important to claimants that upon changing their post-office addresses they promptly notify the local officers of such change, for in case of failure to do so their entries may be canceled upon notice sent to the address of record but not received by them. The register and receiver will be careful to note the post-office address on their records.

11. The application and corroborating affidavits and all other proofs, affidavits, and oaths of any kind whatsoever required by law to be made by applicants and entrymen and their corroborating witnesses may be executed before the register or receiver of the land district in which the land is located, or before a United States commissioner, or a judge or clerk of a court of record, or before a duly qualified deputy clerk of court who regularly acts for the clerk and performs duties of the office in the name of his principal at the county seat, in the county or land district in which the land is situated, without any showing as to the nearness or accessibility of such officer, or outside both the county and land district, upon a showing by affidavit, satisfactory to the Commissioner of the General Land Office, that the officer so acting was, because of topographic or geographic conditions, nearer or more accessible to the land. Reference is had to Circular No. 884, dated March 23, 1923 (49 L. D. 497), and Circular No. 894, dated May 8, 1923 (49 L. D. 586).

The application is not acceptable if executed more than 10 days before its filing at the local office.

#### EVIDENCE AS TO WATER RIGHT MUST ACCOMPANY APPLICATION

12. No desert-land application will be allowed unless accompanied by evidence satisfactorily showing either that the intending entryman has already acquired by appropriation, purchase, or contract a right to the permanent use of sufficient water to irrigate and reclaim

all of the irrigable portion of the land sought, or that he has initiated and prosecuted, as far as then possible, appropriate steps looking to the acquisition of such a right. If applicant intends to procure water from an irrigation district, corporation, or association, but is unable to obtain a contract for the water in advance of the allowance of his entry, then he must furnish, in lieu of the contract, some written assurance from the responsible officials of such district, corporation, or association that, if his entry be allowed, applicant will be able to obtain from that source the necessary water. All applications not accompanied by the evidence above indicated will be rejected.

#### PROPOSED IRRIGATION SYSTEM MUST BE PRACTICABLE

13. At the time of filing the declaration with the register and receiver the applicant must also file plans describing in detail the following: Source of water supply; character of the irrigation works constructed, in course of construction, or proposed to be constructed, i. e., reservoirs for storage, canals, flumes, or other methods by which water is to be conserved and conveyed to the land; if by direct diversion, the character and volume of the flow of the streams or springs, whether perennially flowing or intermittent. If the works have not been constructed, it must be shown whether they are to be built by an irrigation district, a corporation, or an association, and a general description of the proposed plan must be furnished. It must be shown in connection with any proposed plan whether, and by whom, surveys and investigations have been made which demonstrate the existence of a sufficient water supply and the feasibility of the proposed works to convey water to the land. If the applicant individually, or in association with others, proposes to construct irrigation works, a sworn statement must accompany the declaration, containing a general description of the proposed works, an estimate of the cost, and such other data as will enable the department to determine the sufficiency of the water supply and the feasibility of the proposed works to convey water to the lands to be irrigated. If the irrigation is proposed by means of artesian wells or by pumping from nonartesian underground sources of water supply, sworn evidence must be submitted as to the existence of such water supply upon or near the land involved, including a statement as to other wells theretofore sunk and affording a water supply to adjoining or near-by lands.

With respect to the land itself, a specific showing must be submitted as to its approximate altitude, character of the soil, the approximate irrigable area of each legal subdivision, and the position and direction of the proposed permanent main and lateral ditches on the land, and that the land is of such contour that it can be irrigated from the proposed system. The map required to be filed by section 4 of the act of March 3, 1891 (26 Stat. 1095), must be sufficiently definite and accurate (preferably, but not necessarily, prepared by a licensed engineer) to show the plan for conducting water to the land to be irrigated. The register and receiver will carefully examine the evidence submitted in such declarations, and either reject defective declarations or require additional evidence to be filed.

At the time of filing his declaration, plans, and the statements submitted therewith the applicant must pay the receiver the sum of 25 cents per acre for the lands therein described, the declaration to be given its proper serial number at that time, in accordance with existing regulations. No rights to the land are initiated by the filing of an application unless this sum is paid or tendered. The receiver will issue a receipt for the money, and after proper notations have been made on the local office records the application will be transmitted to the proper chief of field division for report as to the sufficiency of the alleged water supply and the feasibility of the proposed plans. The register and receiver will furnish the chief of field division any facts in their knowledge with respect to the land, the water supply, or the proposed plan of irrigation, including the financial responsibility and general ability of the irrigation districts, corporations, or associations which propose to construct works for the reclamation of such land. In all cases the register and receiver will certify as to the status of the lands as shown by their records, and when forwarding an application for report they will attach all papers filed by the applicant. No application will be forwarded to the chief of field division until all evidence required as aforesaid has been furnished by the applicant; nor, in the case of an application for second entry, until the application has been transmitted to the Commissioner of the General Land Office for consideration and returned by him to the local officers.

When an application is received by the chief of field division he will have same considered by a field examiner, who will make a written report thereon recommending the allowance or rejection of the application. If such report is favorable and the chief of field division is of the opinion that the entry should be allowed, he will return the application to the register and receiver, with the report and recommendation to that effect, whereupon the register and receiver will pass upon it in regular order in the light of the report, which is to be attached to the application and become a part of the record, and in the absence of any objection will sign the certificate at the end of the declaration under date of its allowance, and advise the applicant.

If, however, the chief of field division is of the opinion that the entry should not be allowed, he will have a full report prepared on the application and transmit the entire record to the General Land Office for consideration and action, advising the register and receiver thereof.

In the event that an applicant alleges a company, an association, or an irrigation district as the proposed source of water supply, upon which report has not been submitted, the chief of field division will cause an investigation to be made of such project and have a report submitted thereon to the commissioner, making a definite recommendation as to the allowance of original entries under the project, and will transmit the application involved with the report.

If the project alleged as the source of water supply has been reported upon, but no action on such report has been taken by the commissioner, the chief of field division will transmit the application to the General Land Office with appropriate recommendation.

In the event the applicant alleges a project which has been passed upon by the commissioner, the chief of field division will consider same in accordance with the conclusions reached, and in the event that favorable action is warranted will return the papers to the register and receiver with proper report and recommendation. In case adverse action is necessary, the chief of field division will transmit the application to the General Land Office with proper recommendation.

Should the commissioner, after consideration of the examiner's report and the showing made by the applicant, deny the right to make entry, the applicant will be allowed the right to apply for a hearing or to appeal, as he may desire.

If an application is not returned by the chief of field division in time to be considered and allowed by the register and receiver and transmitted with the returns for the month during which filed, the register will note "To C. F. D." (giving date) in the remarks column of the "General schedule of serial numbers," and will forward with the returns for that month a separate report on Form 4-030 for each application so held by the chief of field division.

Registers and receivers will render any reasonable assistance to applicants and witnesses in preparing their declarations and affidavits, but it is no part of the duty of these officers to prepare, or assist in preparing, the map, plans, or evidence of water right required to be filed with the declaration. Intending applicants should cause all such documents and papers to be prepared in advance and have them ready for filing with the declarations.

#### ASSIGNMENTS

*See Press Copy Vol 5 - page 328*

14. While by the act of March 3, 1891, assignments of desert-land entries were recognized, the Land Department, largely for administrative reasons, held that a desert-land entry might be assigned as a whole or in its entirety, but refused to recognize the assignment of only a portion of an entry. The act of March 28, 1908, however, provides for an assignment of such entries, in whole or in part, but this does not mean that less than a legal subdivision may be assigned. Therefore no assignment, otherwise than by legal subdivisions, will be recognized. The legal subdivisions assigned must be contiguous. (With regard to the assignment of desert-land entries within Government reclamation projects, see General Reclamation Circular.)

15. The act of March 28, 1908, also provides that no person may take a desert-land entry by assignment unless he is qualified to enter the tract so assigned to him. Therefore, if a person is not at least 21 years of age and, excepting Nevada, a resident citizen of the State wherein the land involved is located; or if he is not a citizen of the United States, or a person who has declared his intention to become a citizen thereof; or, if he has made a desert-land entry in his own right and is not entitled under the act of September 5, 1914, to make a second entry, he can not take such an entry by assignment. The language of the act indicates that the taking of an entry by assignment is equivalent to the making of an entry, and this being so, no person is allowed to take more than one entry by assignment, unless it be done as the exercise of a right of second entry. The right of entry under the desert-land law is exhausted either by filing an allowable application and withdrawing it prior

to its allowance or by making an entry or by taking one by assignment, unless such entry be subsequently lost, forfeited, or abandoned because of matters beyond the claimant's control.

A person who has the right to make a second desert-land entry under the act of September 5, 1914, may exercise that right by taking an assignment of a desert-land entry, or part of such entry, if he is otherwise qualified, to make a desert-land entry for the particular tract assigned. The right to make a second desert-land entry, however, is not possessed by any person who has assigned some former entry or part thereof. (See par. 5.)

✓ The act of March 28, 1908, also provides that no assignment to or for the benefit of any corporation shall be authorized or recognized.

16. As stated above, desert-land entries may be assigned, in whole or in part, and as evidence of the assignment there should be transmitted to the General Land Office the original deed of assignment or a certified copy thereof. Where the deed of assignment is recorded a certified copy may be made by the officer who has custody of the record. Where the original deed is presented to an officer qualified to take proof in desert-land cases a copy certified by such officer will be accepted. Attention is called to the fact that copies of deeds of assignment certified by notaries public or justices of the peace, or, indeed, any other officer than those who are qualified to take proofs and affidavits in desert-land cases, will not be accepted.

An assignee must file with his deed of assignment an affidavit (Form 4-274c) showing his qualifications to take the entry assigned to him. He must show what applications or entries, if any, have been made by him or what entries assigned to him under the agricultural public-land laws, and he must also show his qualifications as a citizen of the United States; that he is 21 years of age or over; and also that he is a resident citizen of the State in which the land assigned to him is situated, except in the State of Nevada, where citizenship of the United States only is required. If the assignee is not a native-born citizen of the United States, he should also furnish a certified copy of his declaration of intention to become a citizen or a certified copy of his certificate of naturalization, as the case may be. If the assignee is a woman, she should in all cases state whether or not she is married, and if so, show that in accordance with the rules explained in paragraph 4 her citizenship is not lost by reason of the alienage of her husband. In short, the assignee must prove that he possesses all the qualifications necessary to enable him to make a desert-land entry for the land proposed to be assigned were it subject to entry. Desert-land entries are initiated by the payment of 25 cents per acre, and no assignable right is acquired by the applicant prior to such payment. (6 L. D. 541; 33 L. D. 152.) An assignment made on the day of such payment, or soon thereafter, is treated as suggesting fraud, and such cases will be carefully scrutinized. The provisions of law authorizing the assignment of desert entries, in whole or in part, furnish no authority to a claimant under said law to make an executory contract to convey the land after the issuance of patent and thereafter to proceed with the submission of final proof in furtherance of such

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contract. (34 L. D. 383.) The sale of land embraced in an entry at any time before final payment is made must be regarded as an assignment of the entry, and in such cases the person buying the land must show that he possesses all the qualifications required of an assignee. (29 L. D. 453.) The assignor of a desert-land entry may execute the assignment before any officer authorized to take acknowledgments of deeds, but the assignee must execute the affidavit as to his qualifications (Form 4-274c) and all other required oaths and affidavits before some one of the officers specified in paragraph 11 of this circular.

No assignments of desert-land entries or parts of entries are conclusive until examined in the General Land Office and found satisfactory and the assignment recognized. When recognized, however, the assignee takes the place of the assignor as effectually as though he had made the entry, and is subject to any requirement that may be made relative thereto. The assignment of a desert-land entry to one disqualified to acquire title under the desert land law, and to whom, therefore, recognition of the assignment is refused by the General Land Office, does not of itself render the entry fraudulent, but leaves the right thereto in the assignor. In such connection, however, see 42 L. D. 90 and 48 L. D. 519.

After final proof and payment have been made the land may be sold and conveyed to another person without the approval of the General Land Office, but all such conveyances are nevertheless subject to the superior rights of the United States, and the title so obtained would fall if it should be finally determined that the entry was illegal or that the entryman had failed to comply with the law.

Lands embraced in unperfected desert-land entries are not subject to taxation by the State authorities, nor to levy and sale under execution to satisfy judgments against the entrymen.

Lands embraced in desert-land entries within an irrigation district which the Secretary of the Interior has approved under the act of August 11, 1916 (39 Stat. 506), may be taxed and otherwise dealt with as provided by said act. (See Circular No. 592, referred to in par. 5.)

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A desert-land entryman may, however, mortgage his interest in the entered land if, by the laws of the State in which the land is situated, a mortgage of land is regarded as merely creating a lien thereon and not as a conveyance thereof. The purchaser at a sale had for the foreclosure of such mortgage may be recognized as assignee upon furnishing proof of his qualifications to take a desert-land entry by assignment. Transferees, after final proof, mortgagees, or other encumbrancers may file in the proper local land office written notice stating the nature of their claims, and they will thereupon become entitled to receive notice of any action taken by the Land Department with reference to the entry. The register and receiver will report all such claims by separate letters, to be forwarded with their current returns to the General Land Office.

#### ANNUAL PROOF

17. In order to test the sincerity and good faith of claimants under the desert land laws and to prevent the segregation for a number of years of public lands in the interest of persons who have no intention

to reclaim them, Congress, in the act of March 3, 1891, made the requirement that a map be filed at the initiation of the entry showing the mode of contemplated irrigation and the proposed source of water supply, and that there be expended yearly for three years from the date of the entry not less than \$1 for each acre of the tract entered, making a total of not less than \$3 per acre, in the necessary irrigation, reclamation, and cultivation of the land, in permanent improvements thereon, and in the purchase of water rights for the irrigation thereof, and that at the expiration of the third year a map or plan be filed showing the character and extent of the improvements placed on the claim. Said act, however, authorizes the submission of final proof at an earlier date than four years from the time the entry is made in cases wherein reclamation has been effected and expenditures of not less than \$3 per acre have been made. Proof of these expenditures must be made before some officer authorized to administer oaths in public-land cases. (See par. 11 hereof.)

This proof, which is known as yearly or annual proof, must consist of the affidavits of "two or more credible witnesses," each of whom must have personal knowledge that the expenditures were made for the purpose stated in the proof. The testimony of such witnesses may be supplemented by the affidavit of the claimant, at his option, but he is not required by law to make oath as to the annual expenditures upon or for the benefit of the land. (42 L. D. 165.) Annual proofs must contain itemized statements showing the manner in which expenditures were made.

#### ACCEPTABLE EXPENDITURES

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18. Expenditures for the construction and maintenance of storage reservoirs, dams, canals, ditches, and laterals to be used by claimant for irrigating his land; for roads where they are necessary; for erecting stables, corrals, etc.; for digging wells, where the water therefrom is to be used for irrigating the land; for stock or interest in an approved irrigation company, or for taxes paid to an approved irrigation district, through which water is to be secured to irrigate the land; and for leveling and bordering land proposed to be irrigated, will be accepted. Expenditures for fencing all or a portion of the claim, for surveying for the purpose of ascertaining the levels for canals, ditches, etc., and for the first breaking or clearing of the soil, are also acceptable.

The value to be attached to, and the credit to be given for, an expenditure for works or improvements is the reasonable value of the work done or improvement placed upon the land, according to the market price therefor, or for similar work or improvements prevailing in the vicinity, and not the amount alleged by a claimant to have been expended, nor the mere proof of expenditures, as exhibited by checks or other vouchers. (*Bradley v. Vasold*, 36 L. D. 106.) (See Circular No. 933, dated April 26, 1924.)

#### EXPENDITURES NOT ACCEPTABLE

Expenditures for cultivation after the soil has been first prepared may not be accepted, because the claimant is supposed to be compensated for such work by the crops to be reaped as a result of culti-

vation. Expenditures for surveying the claim in order to locate the corners of same may not be accepted. The cost of tools, implements, wagons, and repairs to same, used in construction work, may not be computed in cost of construction. Expenditures for material of any kind will not be allowed unless such material has actually been installed or employed in and for the purpose for which it was purchased. For instance, if credit is asked for posts and wire for fences or for pump or other well machinery, it must be shown that the fence has been actually constructed or the well machinery actually put in place. No expenditures can be credited on annual proofs upon a desert-land entry unless made on account of that particular entry, and expenditures once credited can not be again applied. This rule applies to second entries as well as to original entries, and a claimant who relinquishes his entry and makes second entry of the same land under the act of September 5, 1914, can not receive credit on annual proofs upon the second entry for expenditures made on account of the former entry. (41 L. D. 601 and 42 L. D. 523.)

Expenditures for the clearing of the land will not receive credit in cases where the vegetation or brush claimed to have been cleared away has not been actually removed by the roots. Therefore, expenditures for clearing, where as a matter of fact there has been only crushing, or rolling, or what is known in some localities as "railing" the land, will not be accepted. (See Circular No. 933, dated April 26, 1924.) *Page 398 + 5/10564*

No expenditures for stock or interest in an irrigation company, through which water is to be secured for irrigating the land, will be accepted as satisfactory annual expenditure until a special agent, or other authorized officer, has submitted a report as to the resources and reliability of the company, including its actual water right, and such report has been favorably acted upon by the General Land Office. The stock purchased must carry the right to water, and it must be shown that payment in cash has been made at least to the extent of the amount claimed as expenditure for the purchase of such stock in connection with the annual proof submitted, and such stock must be actually owned by the claimants at the time of the submission of final proof.

Registers and receivers are instructed to examine carefully all annual proofs filed and are authorized to suspend them, with notice to claimants to cure defects within 30 days, or to reject them, subject to the usual right of appeal to the Commissioner of the General Land Office. These proofs are to be forwarded with the regular monthly returns. However, no annual proof which alleges an expenditure for stock or interest in an irrigation company should be rejected merely because the expenditure was of that character unless such rejection be warranted under instructions issued by the Commissioner of the General Land Office in acting upon the special agent's report on the particular company in question. If no such instructions have been issued, and the company referred to in the annual proof be one on which the local officers have not previously requested a report from the proper chief of field division, they will immediately call for such report and advise the commissioner thereof by special letter. They will also indorse the fact and date of the call upon the margin of the annual proof and forward it to the General Land Office with the regular returns.

### NOTICE TO DELINQUENT CLAIMANTS

Local officers will examine their records frequently for the purpose of ascertaining whether all annual proofs due on pending desert-land entries have been made, and in every case where the claimant is in default in that respect they will send him notice and allow him 60 days in which to submit such proof. If the proof is not furnished as required the fact that notice was served upon the claimant should be reported to the General Land Office, with evidence of service, whereupon the entry will be canceled. During the pendency of a Government proceeding initiated by such notice the entry will be protected against a private contest charging failure to make the required expenditures, and such contest will neither defeat the claimant's right to equitably perfect the entry as to the matter of expenditures during the 60 days allowed in the notice nor secure to the contestant a preference right in event the entry be canceled for default under said notice.

### EXTENSION OF TIME FOR FILING ANNUAL PROOF NOT ALLOWED

*See 45 L. D. 172*

The law makes no provision for an extension of time in which to file annual proof on desert-land entries not embraced within the exterior boundaries of any withdrawal or irrigation project under the reclamation act of June 17, 1902 (32 Stat. 388), and extensions for said purpose can not therefore be granted. However, where a township is suspended from entry for the purpose of resurvey thereof the time between the date of suspension and the filing in the local office of the new plat of survey will be excluded from the period accorded by law for the reclamation of land under a desert entry within such township and the statutory life of the entry extended accordingly (40 L. D. 223). During the continuance of the extension the claimant may, at his option, defer the making of annual expenditures and proof thereof.

19. Nothing in the statutes or regulations should be construed to mean that the entryman must wait until the end of the year to submit his annual proof, because the proof may be properly submitted as soon as the expenditures have been made. Proof sufficient for the three years may be offered whenever the amount of \$3 an acre has been expended in reclaiming and improving the land, and thereafter annual proof will not be required.

### FINAL PROOF

20. The entryman, his assigns, or, in case of death, his heirs or devisees, are allowed four years from date of the entry within which to comply with the requirements of the law as to reclamation and cultivation of the land and to submit final proof, but final proof may be made and patent thereon issued as soon as there has been expended the sum of \$3 per acre in improving, reclaiming, and irrigating the land, and one-eighth of the entire area entered has been properly cultivated and irrigated, and when the requirements of the desert land laws as to water rights and the construction of the necessary reservoirs, ditches, dams, etc., have been fully complied with.

## NOTICES OF INTENTION TO MAKE FINAL PROOF

When an entryman has reclaimed the land and is ready to make final proof, he should apply to the register and receiver for a notice of intention to make such proof. This notice must contain a complete description of the land, give the number of the entry and name of the claimant, and must bear an indorsement specifically indicating the source of his water supply. If the proof is made by an assignee, his name, as well as that of the original entryman, should be stated. It must also show when, where, and before whom the proof is to be made. Four witnesses may be named in this notice, two of whom must be used in making proof. Care should be exercised to select as witnesses persons who are familiar, from personal observation, with the land in question, and with what has been done by the claimant toward reclaiming and improving it. Care should also be taken to ascertain definitely the names and addresses of the proposed witnesses, so that they may correctly appear in the notice.

## PUBLICATION OF FINAL-PROOF NOTICE

21. This notice must be published once a week for five successive weeks in a newspaper of established character and general circulation published nearest the lands (see 38 L. D. 131; 43 L. D. 216), and must also be posted in a conspicuous place in the local land office for the same period of time. The claimant must pay the cost of the publication, but it is the duty of registers to procure the publication of proper final-proof notices, and registers should accordingly exercise the utmost care in that behalf. (40 L. D. 459.) The date fixed for the taking of the proof must be at least 30 days after the date of first publication. Proof of publication must be made by the affidavit of the publisher of the newspaper or by some one authorized to act for him. The register will certify to the posting of the notice in the local office.

22. On the day set in the notice (or, in the case of accident or unavoidable delay, within 10 days thereafter) and at the place and before the officer designated, the claimant will appear with two of the witnesses named in the notice and make proof of the reclamation, cultivation, and improvement of the land. The testimony of each claimant should be taken separately and apart from and not within the hearing of either of his witnesses, and the testimony of each witness should be taken separately and apart from and not within the hearing of either the applicant or of any other witness, and both the applicant and each of the witnesses should be required to state, in and as a part of the final-proof testimony given by them, that they have given such testimony without any actual knowledge of any statement made in the testimony of either of the others. In every instance where, for any reason whatever, final proof is not submitted within the four years prescribed by law, or within the period of an extension granted for submitting such proof, an affidavit should be filed by claimant, with the proof, explaining the cause of delay.

## OFFICERS QUALIFIED TO TAKE FINAL PROOF

The final proof may be made before any one of the officers named and under the conditions prescribed in paragraph 11.

No showing by affidavit need be made where final proof is taken outside the county or land district in which the land is located, if the proof be taken in the town or city where the newspaper is published in which the final-proof notice is printed.

## SHOWING REQUIRED ON FINAL PROOF AS TO IRRIGATION, CULTIVATION, AND WATER RIGHTS

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23. The final proof must show specifically the source and volume of the water supply and how it was acquired and how it is maintained. The number, length, and carrying capacity of all ditches to and on each of the legal subdivisions must also be shown. The claimant and the witnesses must each state in full all that has been done in the matter of reclamation and improvements of the land, and must answer fully, of their own personal knowledge, all of the questions contained in the final-proof blanks. They must state plainly whether at any time they saw the land effectually irrigated, and the different dates on which they saw it irrigated should be specifically stated.

24. While it is not required that all of the land shall have been actually irrigated at the time final proof is made, it is necessary that the one-eighth portion which is required to be cultivated shall also have been irrigated in a manner calculated to produce profitable results, considering the character of the land, the climate, and the kind of crops being grown. (Alonzo B. Cole, 38 L. D. 420.) The cultivation and irrigation of the one-eighth portion of the entire area entered may be had in a body on one legal subdivision or may be distributed over several subdivisions. The final proof must clearly show that all of the permanent main and lateral ditches necessary for the irrigation of all the irrigable land in the entry have been constructed so that water can be actually applied to the land as soon as it is ready for cultivation. If pumping be relied upon as the means of irrigation, the plant installed for that purpose must be of sufficient capacity to render available enough water for all the irrigable land. If there are any high points or any portions of the land which for any reason it is not practicable to irrigate, the nature, extent, and situation of such areas in each legal subdivision must be fully stated. If less than one-eighth of a smallest legal subdivision is practically susceptible of irrigation from claimant's source of water supply and no portion thereof is used as a necessary part of his irrigation scheme, such subdivision must be relinquished. (43 L. D. 269.)

25. As a rule, actual tillage of one-eighth of the land must be shown. It is not sufficient to show only that there has been a marked increase in the growth of grass or that grass sufficient to support stock has been produced on the land as a result of irrigation. If, however, on account of some peculiar climatic or soil conditions, no crops except grass can be successfully produced, or if actual tillage will destroy or injure the productive quality of the soil, the actual

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production of a crop of hay of merchantable value will be accepted as sufficient compliance with the requirements as to cultivation. (32 L. D. 456.) In such cases, however, the facts must be stated and the extent and value of the crop of hay must be shown, and, as before stated, that same was produced as a result of actual irrigation.

26. In every case where the claimant's water right is founded upon contract or purchase the final proof must embrace evidence which clearly establishes the fact and legal sufficiency of that right. If claimant's ownership of such right has already been evidenced in connection with the original entry or some later proceeding, then the final proof must show his continued possession thereof. If the water right relied on is obtained under claimant's appropriation, the final proof, considered together with any evidence previously submitted in the matter, must show that the claimant has made such preliminary filings as are required by the laws of the State in which the land is located, and that he has also taken all other steps necessary under said laws to secure and perfect the claimed water right. In all cases the water right, however it be acquired, must entitle the claimant to the use of a sufficient supply of water to irrigate successfully all the irrigable land embraced in his entry, notwithstanding that the final proof need only show the actual irrigation of one-eighth of that area.

In those States where entrymen have made applications for water rights and have been granted permits but where no final adjudication of the water right can be secured from the State authorities owing to delay in the adjudication of the watercourses or other delay for which the entrymen are in no way responsible, proof that the entrymen have done all that is required of them by the laws of the State, together with proof of actual irrigation of one-eighth of the land embraced in their entries, may be accepted. This modification of the rule that the claimant must furnish evidence of an absolute water right will apply only in those States where under the local laws it is impossible for the entryman to secure final evidence of title to his water right within the time allowed him to submit final proof on his entry, and in such cases the best evidence obtainable must be furnished. (35 L. D. 305.)

It is a well-settled principle of law in all of the States in which the desert land acts are operative that actual application to a beneficial use of water appropriated from public streams measures the extent of the right to the water, and that failure to proceed with reasonable diligence to make such application to beneficial use within a reasonable time constitutes an abandonment of the right. (Wiel's Water Rights in the Western States, sec. 172.) The final proof, therefore, must show that the claimant has exercised such diligence as will, if continued, under the operation of this rule result in his definitely securing a perfect right to the use of sufficient water for the permanent irrigation and reclamation of all of the irrigable land in his entry. To this end the proof must at least show that water which is being diverted from its natural course and claimed for the specific purpose of irrigating the lands embraced in claimant's entry, under a legal right acquired by virtue of his own or his grantor's compliance with the requirements of the State laws governing the appropriation of public waters, has ac-

tually been conducted through claimant's main ditches to and upon the land; that one-eighth of the land embraced in the entry has been actually irrigated and cultivated; that water has been brought to such a point on the land as to readily demonstrate that the entire irrigable area may be irrigated from the system; and that claimant is prepared to distribute the water so claimed over all of the irrigable land in each smallest legal subdivision in quantity sufficient for practical irrigation as soon as the land shall have been cleared or otherwise prepared for cultivation. The nature of the work necessary to be performed in and for the preparation for cultivation of such part of the land as has not been irrigated should be carefully indicated, and it should be shown that the said work of preparation is being prosecuted with such diligence as will permit of beneficial application of appropriated water within a reasonable time.

Desert-land claimants should bear in mind that a water right and a water supply are not the same thing and that the two are not always or necessarily found together. Strictly speaking, a perfect and complete water right for irrigation purposes is confined to and limited by the area of land that has been irrigated with the water provided thereunder. Under the various State laws, however, an inchoate or incomplete right may be obtained which is capable of ripening into a perfect right if the water is applied to beneficial use with reasonable diligence. A person may have an apparent right of this kind for land which he has not irrigated, and which, moreover, he never can irrigate because of the lack of available water to satisfy his apparent right. Such an imperfect right, of course, can not be viewed as meeting the requirements of the desert land law which contemplates the eventual reclamation of all the irrigable land in the entry. Therefore, and with special reference to that portion of the irrigable land of an entry not required to be irrigated and cultivated before final proof, an incomplete (though real) water right will not be acceptable if its completion appears to be impossible because there is no actual supply of water available under the appropriation in question.

27. Where the water right claimed in any final proof is derived from an irrigation project it must be shown that the entryman owns such an interest therein as entitles him to receive from the irrigation works of the project a supply of water sufficient for the proper irrigation of the land embraced in his entry. Investigations by field agents as to the resources and reliability, including particularly the source and volume of the water supply, of all irrigation companies, associations, and districts through which desert-land entrymen seek to acquire water rights for the reclamation of their lands are being made as rapidly as possible, and it is the purpose of the General Land Office to accept no annual or final proofs based upon such a water right until an investigation of the company in question has been made and report thereon approved. The information so acquired will be regarded as determining, at least tentatively, the amount of stock or interest which is necessary to give the entryman a right to a sufficient supply of water; but the entryman will be permitted to challenge the correctness of the report as to the facts alleged and the validity of its conclusions and to offer, either with his final proof

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or subsequently, such evidence as he can tending to support his contentions.

Entrymen applying to make final proof are required to state the source of their water supply, and if water is to be obtained from the works of an irrigation company, association, or district the local officers will indorse the name and address of the project upon the copy of the notice to be forwarded to the chief of field division. If the report on the company has been acted upon by the General Land Office and the proof submitted by claimant does not show that he owns the amount of stock or interest in the company found necessary for the area of land to be reclaimed, the local officers will suspend the proof, advise the claimant of the requirements made by the General Land Office in connection with the report, and allow him 30 days within which to comply therewith or to make an affirmative showing in duplicate and apply for a hearing. In default of any action by him within the specified time they will reject the proof, subject to the usual right of appeal. If application for hearing be filed, the local officers will transmit one copy thereof to the proper chief of field division and forward the other copy, with the final proof record, to the General Land Office.

#### FINAL PROOF EXPIRATION NOTICE

28. Where final proof is not made within the period of four years, or within the period for which an extension of time has been granted, the register and receiver should send the claimant a notice, addressed to him at his post-office address of record, informing him that he will be allowed 90 days in which to submit final proof; or if the death of the claimant of record be suggested, such notice should also be addressed to the claimant at the post office nearest the land. (44 L. D. 364.)

Should no action be taken within the time allowed, the register and receiver will report that fact, together with evidence of service, to the General Land Office, whereupon the entry will be canceled. The notice provided for in this paragraph must not be construed as an extension of time or as relieving the claimant from the necessity of explaining why the proof was not made within the statutory period or within such extensions of that period as have been specifically granted.

#### FINAL PROOF NOT REQUIRED WHILE TOWNSHIP IS SUSPENDED FOR RESURVEY, BUT MAY BE SUBMITTED AT CLAIMANT'S OPTION—PROCEDURE

No claimant will be required to submit final proof while the township embracing his entry is under suspension for the purpose of resurvey. (40 L. D. 223.) This also applies to annual proof. (See par. 18.) In computing the time when final proof on an entry so affected will become due the period between the date of suspension and the filing in the local office of the new plat of survey will be excluded. However, if the claimant so elects, he may submit final proof on such entry notwithstanding the suspension of the township. If submitted, the final proof will be received by the local officers, who will pursue the same course in regard thereto that would have

been pursued in the absence of the suspension. Should final certificate be issued on any such proof, it will describe the entered land in terms of the original survey with reference to the plat of such survey and to the fact of a pending resurvey, as follows:

In accordance with official plat of survey approved -----; resurvey now pending under Group No. ----- G. L. O.; authorization dated -----

*See also act of Feb 25 1925 - 5120 149*  
*See 4530217 4620 203*  
**EXTENSION OF TIME FOR SUBMITTING FINAL PROOF**

29. There are four general acts of Congress which authorize the allowance, under certain conditions, of an extension of time for the submission of final proof by a desert-land claimant. Said acts are the following: June 27, 1906 (34 Stat. 519, sec. 5); March 28, 1908 (35 Stat. 52, sec. 3); April 30, 1912 (37 Stat. 106); and March 4, 1915 (38 Stat. 1138-1161, sec. 5). The act of June 27, 1906, is applicable only to entries embraced within the exterior limits of some withdrawal or irrigation project under the reclamation act of June 17, 1902 (32 Stat. 388). For regulations governing extensions under said act of June 27, 1906, see General Reclamation Circular. The act of March 4, 1915, is applicable only to entries made prior to March 4, 1915; and while authorizing in certain cases an additional extension to claimants who have had one or more extensions under previous laws, this act denies any extension under its terms to claimants who can obtain such benefit under prior acts. For regulations governing extensions under the act of March 4, 1915, see paragraphs 34 to 36 of this circular.

30. Under the provisions of the act of March 28, 1908, the period of four years may be extended, in the discretion of the Commissioner of the General Land Office, for an additional period not exceeding three years, if, by reason of some unavoidable delay in the construction of the irrigating works intended to convey water to the land, the entryman is unable to make proof of reclamation and cultivation required within the four years. This does not mean that the period within which proof may be made will be extended as a matter of course for three years. The statute authorizes the Commissioner of the General Land Office to grant the extension, in his discretion, for such a period as he may deem necessary for the completion of the reclamation, not exceeding three years, but applications for extension under said act will not be granted unless it be clearly shown that the failure to reclaim and cultivate the land within the regular period of four years was due to no fault on the part of the entryman but to some unavoidable delay in the construction of the irrigation works for which he was not responsible and could not have readily foreseen. (37 L. D. 332.) It must also appear that he has complied with the law as to annual expenditures and proof thereof. *4120 6011 4270 523*

Under the provisions of the act of April 30, 1912, the Secretary of the Interior may, in his discretion, in addition to the extension authorized by previous legislation, grant to any entryman under the desert land laws a further extension of time for submitting final proof, not exceeding three years, where it is shown that, because of some unavoidable delay in the construction of irrigation works intended to convey water to the land embraced in his entry, the claim-

ant is, without fault on his part, unable to make proof of the reclamation and cultivation of said lands within the time limited therefor, but such further extension can not be granted for a period of more than three years nor affect contests initiated for a valid existing reason. Said act also provided:

That the total extension of the statutory period for making final proof that may be allowed in any one case under this act, and any other existing statutes of either general or local application, shall be limited to six years in the aggregate.

An entryman who has complied with the law as to annual expenditures and proof thereof and who desires to make application for extension of time under the provisions of the act of March 28, 1908, should file with the register and receiver an affidavit setting forth fully the facts, showing how and why he has been prevented from making final proof of reclamation and cultivation within the regular period. This affidavit should be executed before one of the officers named in paragraph 11 of this circular and must be corroborated by two witnesses who have personal knowledge of the facts; and the register and receiver, after carefully considering all of the facts, will forward the application to the proper chief of field division, with appropriate recommendation, and advise the Commissioner of the General Land Office of such reference.

The register and receiver are required to suspend any application for extension of time if they consider the affidavit defective in form or substance, allowing the applicant a reasonable time to make such amendments therein as may be deemed necessary to remove the defects or to file exceptions to the requirements made, and advising the applicant that upon his failure to take any action within the time specified appropriate recommendations will be made. After the expiration of the time thus granted the original application and the amended affidavits or exceptions, as the case may be, together with proper report and recommendations of the register and receiver, will be transmitted to the chief of field division.

Applications for further extension of time under the act of April 30, 1912, may be made in the same manner, and the same procedure will be followed with respect to such applications as under the act of March 28, 1908, and the act of March 4, 1915, as amended.

#### PROCEDURE ON APPLICATIONS FOR EXTENSION OF TIME FOR FINAL PROOF WHERE CONTEST IS PENDING

31. A pending contest against a desert-land entry will not prevent the allowance of an application for extension of time, where the contest affidavit does not charge facts tending to overcome the prima facie showing of right to such extension. (41 L. D. 603.)

Consideration by the General Land Office of an application for extension of time will not be deferred because of the pendency of a contest against the entry in question unless the contest charges be sufficient, if proven, to negative the right of the entryman to an extension of time for making final proof. If the contest charges be insufficient, the application for extension, where regular in all respects, will be allowed and the contest dismissed subject to the right of appeal, but without prejudice to the contestant's right to amend his charges. (See Circular 174, dated September 27, 1912.)

## PAYMENTS—FEES

32. At the time of making final proof the claimant must pay to the receiver the sum of \$1 per acre for each acre of land upon which proof is made. This, together with the 25 cents per acre paid at the time of making the original entry, will amount to \$1.25 per acre, which is the price to be paid for all lands entered under the desert land law, except where the entry is perfected by commutation or purchase under the act of March 4, 1915. (See pars. 42 and 48 of this circular.) The receiver will issue a receipt for the money paid, and if the proof is satisfactory, the register will issue a certificate in duplicate and deliver one copy to the claimant and forward the other copy to the General Land Office with the regular returns.

If the entryman is dead and proof is made by anyone for the heirs, no will being suggested in the record, the final certificate should issue to the heirs generally, without naming them; if by anyone for the heirs or devisees, final certificate should issue in like manner to the heirs or devisees.

When final proof is made on an entry made prior to the act of March 28, 1908, for unsurveyed land, if the land is still unsurveyed and such proof is satisfactory, the register and receiver will approve same and forward it to the General Land Office without collecting the final payment of \$1 an acre and without issuing final certificate. Fees for reducing the final-proof testimony to writing should be collected and receipt issued therefor if the proof is taken before the register and receiver. As soon as the plat or plats of any township or townships previously unsurveyed are filed in the local offices the registers and receivers will, without awaiting further instructions from the General Land Office, examine their records for the purpose of determining, if possible, whether or not, prior to the passage of the act of March 28, 1908, any desert-land entry of unsurveyed land was allowed in the locality covered by the said plats; and if any such entries are found intact, they will call upon the claimants thereof to file an affidavit of adjustment, corroborated by two witnesses, giving the correct description, in accordance with the survey of the lands embraced in their respective entries. The local officers will then note these adjustments on their tract books and plats and transmit the affidavits to the General Land Office with separate reports of all conflicts which may have been developed. They will also report any case in which the claimant has failed, after due notice, to file the required affidavit of adjustment.

If final proof has been made upon any desert-land entry so adjusted and the records show that such proof has been found satisfactory by the General Land Office and no conflicts or other objections are apparent, the register and receiver will allow claimant 60 days within which to make final payment for the land, and upon receipt of the same the register will issue final certificate which will be transmitted to the General Land Office with the returns for the current month.

33. No fees or commissions are required of persons making entry under the desert land laws except such fees as are paid to the officers for taking the affidavits and proofs. Unless the entry be perfected under the act of March 4, 1915 (see pars. 42 and 47 of this circular),

the only payments made to the Government are the original payment of 25 cents an acre at the time of making the application and the final payment of \$1 an acre, to be paid at the time of making final proof. Where final proofs are made before the register or receiver in California, Oregon, Washington, Nevada, Colorado, Idaho, New Mexico, Arizona, Utah, Wyoming, and Montana, they will be entitled to receive jointly 22½ cents for each 100 words of testimony reduced to writing; in all other States they will be allowed 15 cents per 100 words for such service. The United States commissioners, judges, and clerks are not entitled to receive a greater sum than 25 cents for each oath administered by them, except that they are entitled to receive \$1 for administering the oath to each entryman and each final-proof witness where final-proof testimony has been reduced to writing by them.

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RELIEF UNDER ACT OF MARCH 4, 1915 (38 STAT. 1138-1161) AMENDED BY ACT OF MARCH 21, 1918. (40 STAT. 458)

*See 462440*  
*4520200*  
 34. The last three paragraphs of section 5 of the act of Congress approved March 4, 1915 (38 Stat. 1138-1161), entitled "An act making appropriations to supply deficiencies in appropriations for the fiscal year 1915 and for prior years, and for other purposes," as amended by the act of March 21, 1918 (40 Stat. 458), authorize the Secretary of the Interior, under rules and regulations to be prescribed by him, to grant relief to certain classes of desert-land claimants. This new law provides that upon certain conditions such an entryman, or his duly qualified assignee, may obtain an extension of time, not exceeding three years from date of its allowance, in which to submit final proof; or that upon certain other conditions he may either complete his entry in the manner required of a homestead claimant or purchase the land on special terms. The following rules and regulations (approved April 13, 1915, Circular 399, and here printed without substantial change) will be observed in the administration of said provisions of law.  
*as to act of Mar 4, 1915. See 5320644*

#### APPLICATIONS FOR RELIEF

35. All applications for the benefits of the new law should be filed prior to the expiration of the time within which the applicant would otherwise be required to make final proof on his desert-land entry in the land office for the district in which the entered land is situated, to be referred to the proper chief of field division with appropriate recommendation, and the Commissioner of the General Land Office to be advised of such reference. They must be supported by the affidavit of the applicant, corroborated by two witnesses, as to the material facts necessary to be shown. All such affidavits must be executed before an officer authorized to administer oaths in desert-land cases. (See par. 11.)

All such applications should contain the name of the entryman and the date of the entry, and, if the entry has been assigned, the name of the assignee and date of the assignment; the description of the land involved; a statement of the various sums of money expended by the applicant or his grantors in an endeavor to reclaim the land, and the particular purpose for which each sum was expended; the facts by

reason of which it has been impossible for claimant to effect reclamation and cultivation and to submit final proof within the usual period, or such extensions thereof as may have been granted; and the facts by reason of which the applicant considers that there is or is not, as the case may be, a reasonable prospect that if an extension of time is granted him, he will be able to secure a sufficient water supply and make final proof of reclamation, irrigation, and cultivation, as required by the desert land law.

#### CONDITIONS FOR EXTENSION OF TIME

36. To entitle an entryman to the benefits of the first of the three paragraphs referred to, the following conditions must exist: (1) The entry must be a lawful, pending entry made prior to March 4, 1915; (2) the entryman must have complied with the requirements of the desert land law with reference to yearly expenditures and the submission of annual proofs thereof; (3) there must be a reasonable prospect that if an extension of time is granted the claimant will be able to make the final proof of reclamation, irrigation, and cultivation as required by law; (4) the case must be one in which an extension of time or a further extension can not properly be allowed under other laws; and (5) there must be established some fact or facts constituting a reasonable excuse for the applicant's failure to comply with the law within the usual time and fairly entitling him, in justice and equity, to this form of relief.

The existence of the first two of these conditions can be determined by examination of the records of the General Land Office, but in order that applicants may have the benefit of every possible circumstance entitling them to equitable consideration, they are privileged to make such further showing as they may desire as to any moneys which they may have expended in improving the land, but not used as the basis of annual proof.

The existence of the third, fourth, and fifth conditions above enumerated must be established in all cases by the affidavits filed in support of the application for relief.

With regard to the third condition, it must be shown what steps the applicant has taken to secure a water right; and either that he has secured such a right (so far as that is possible, under the State laws, in cases where beneficial application of the water to the land has not yet been made), or that there is no reason to doubt that he will be able to secure such a right before his final proof is due; that the source of water supply, if a natural stream, will, in ordinary seasons, furnish the amount of water needed by the claimant to reclaim the irrigable land in his entry after all appropriations prior to his have been satisfied; and, if water is to be taken from wells, that there is reason to believe that an adequate supply can be obtained from that source.

If water is to be obtained through an irrigation company, association, or district upon which a special agent or other officer has made a favorable report, and favorable action on such report has been taken, the existence of the third condition will be taken for granted, provided the applicant shows that he has become the owner of the required amount of stock or interest in the project, or taken

the required steps to secure the inclusion of the land in the district, or that it will be entirely possible for him to do the one or the other, as the case may be.

If an adverse report has been made on the irrigation project in question, or if adverse action thereon has been taken, the applicant may present such showing of facts as may tend to refute the findings made and the conclusions reached, whereupon, if the allegations seem to warrant such action, a hearing will be ordered to determine the merits of the case.

The fourth condition above enumerated will be satisfied if the case does not come within the terms of any of the other acts of Congress providing for the allowance of extensions of time for submitting final proof on desert-land entries.

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As explained in paragraph 29, the extension of time authorized by the act of March 4, 1915, is applicable only to entries made prior to the date of the act. Where the irrigation works intended to convey water to the land have been completed, or for any other reason, the claimant's inability to submit final proof can not be attributed to unavoidable delay in the construction of such irrigation works; where the cause of delay in submitting the final proof is the claimant's temporary inability to acquire water right; or where, on account of drought of greater or less duration, but not likely, in all probability, to be a permanent condition, the operation of a completed system of irrigation works has been hindered or delayed, an application for an extension of time under the first paragraph of the act of March 4, 1915, as amended by the act of March 21, 1918, above cited, can be entertained, except where the entered lands have been included within the exterior limits of a withdrawal or irrigation project under the act of June 17, 1902 (32 Stat. 388), and the submission of satisfactory final proof is being hindered or delayed thereby, so that the case comes within the provisions of the fifth section of the act of June 27, 1906.

No application for extension of time can be allowed, however, if it appears that the claimant's inability to submit final proof as required by the desert land law is due to his own neglect or default; nor will any such application be granted where it appears that there is no reasonable prospect that the applicant will be able to provide a supply of water sufficient to irrigate and permanently reclaim all the irrigable land embraced in his entry, because, in such a case, no extension of time can enable the entryman to comply with the requirements of the desert land law.

OTHER FORMS OF RELIEF

37. The second and third paragraphs of the new law are designed to afford relief in cases of the kind last above mentioned by authorizing the Secretary of the Interior, in his discretion, to permit the applicant to perfect his entry in the manner required of a homestead entryman, or to purchase the land on the terms specified, as the applicant may elect. The entry itself is not transmuted, however, but remains a desert-land entry, subject to a new kind of proof.

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**CONDITIONS AUTHORIZING HOMESTEAD PROOF AND PURCHASE**

38. To entitle a claimant to relief under either of these paragraphs, it must be made to appear to the satisfaction of the Secretary of the Interior (1) that the entry in question is a lawful pending entry, made prior to March 4, 1915; (2) where application for relief is made on behalf of an assignee, that the entry was assigned to him prior to March 21, 1918; (3) that the applicant, or his assignors, have, in good faith, expended the sum of \$3 per acre in the attempt to effect reclamation of the entered land; and (4) that there is no reasonable prospect that if the extension of time authorized under the provisions of this act, or any other existing law, were granted the applicant would be able to secure water sufficient to effect reclamation of the land in his entry or any subdivision thereof. The first two of these conditions can be determined from the records of the General Land Office.

With regard to the third condition, any expenditure which the claimant can show that he has made in good faith, and with a reasonable belief that it would tend to effect reclamation of the land will be acceptable even though such expenditure may not have been such as would satisfy the requirements for annual proof.

With regard to the fourth condition, the applicant should show what steps he has taken for the purpose of acquiring a water right and with what result, what has been done by himself or others toward the development of a water supply and the construction of an irrigation system to bring the water to the land, the reasons for his failure to secure an adequate water supply, and his grounds for believing that there is no reasonable prospect of final success in acquiring such a supply. In this connection consideration will be given to any special agent's reports on file regarding any irrigation company or irrigation district from which applicant has been endeavoring to secure water and if it appears therefrom that there is no reasonable prospect that the applicant can secure a sufficient water supply, the existence of that condition will be taken for granted.

**NOTICE OF ALLOWANCE OF RELIEF—ELECTION TO PURCHASE**

39. When any application for relief under the second paragraph shall have been allowed by the Commissioner of the General Land Office, notice thereof will be served through the proper local land office upon the claimant, advising him that he will be allowed five years from date of service of such notice within which to perfect his entry in the manner required of a homestead entryman, unless he shall, within 60 days from receipt of such notice, file in the local land office an election to perfect the entry within five years by purchase under the third paragraph, and pay to the receiver, at time of election, the sum of 50 cents for each acre embraced in the entry. Such election, if filed, must be in writing, signed by the claimant, and his signature thereto must be witnessed by two persons, whose post-office addresses shall be given. The election will be forwarded to the General Land Office with the regular monthly returns and must bear the serial number of the entry to which it relates, and also the number of the receipt issued for the money paid in connection therewith.

40. In the submission and consideration of final proofs under the second and third paragraphs, the usual course of procedure with regard to desert-land final proofs will be followed, so far as applicable. The notice of intention to submit proof, however, should indicate whether the entry is to be perfected as in homestead cases or by purchase.

41. After a desert-land entry has been authorized to be perfected either in the manner of a homestead entry or by purchase, no assignment thereof will be allowed, for the reason that the benefits of the second and third paragraphs of the act as amended by the act of March 21, 1918, are not available to assignees under assignments made subsequently to the date of the act as amended; and in the final adjudication of entries being perfected under the provisions of said paragraphs, the same rules will be observed, as to proof of nonalienation, as in homestead cases.

ENTRIES PERFECTED BY COMPLIANCE WITH HOMESTEAD LAW

42. A claimant who has received permission to perfect his entry in the manner required of homestead entrymen may make proof at any time when he can show that residence and cultivation have been maintained in good faith for the required length of time and to the required extent.

However, inasmuch as the homestead laws do not authorize the commutation of homesteads made under the enlarged homestead acts, commutation proof will not be accepted upon any desert-land entry involving more than 160 acres. In addition to the original payment of 25 cents per acre at time of entry, a claimant who makes commutations proof must pay for the land at the regular "minimum price" of \$1.25 per acre.

Failure to submit final proof within the five-year period allowed by the law will be ground for the cancellation of the entry, unless good reason for the delay can be shown, in which event final certificate may be issued and the case referred to the board of equitable adjudication for confirmation.

Those provisions of the homestead law which define the personal qualifications required of entrymen do not apply to cases of this kind, but the final proof must show that the claimant possesses the same qualifications as to citizenship and the amount of land entered by him or assigned or patented to him, under the agricultural public-land laws, as in the case of those who make ordinary final proof on desert-land entries.

43. If not already residing on his desert-land entry, the claimant must establish residence thereon within six months from the date of receiving the notice advising him that he will be permitted to perfect his entry under the second paragraph, unless such period be extended as permitted by the homestead law.

Residence upon the land must be continuously maintained for a period of three years from and after the date of its establishment. During each year the claimant may be absent for two periods only, the aggregate thereof not to exceed five months. Actual residence must be maintained for the remaining seven months of each year. If commutation proof is submitted, substantially continuous residence upon the land for a period of 14 months must be shown, to-

gether with the cultivation of not less than one-sixteenth of the area of the entry, unless a reduction of the area required to be cultivated be allowed. The requirements made by this circular as to the period of residence and amount of cultivation are those of the act of June 6, 1912 (37 Stat. 123), or the "three-year homestead law."

If a claimant establishes residence upon his entry prior to the allowance of his application for relief, and continues to maintain it in good faith as required by the homestead law, full credit will be allowed for the period during which such residence is so maintained.

Leaves of absence and credit for military service will be allowed upon the same terms and conditions as in case of a homestead entry.

The claimant must have a habitable house upon the land at the time of submitting final proof. Other improvements should be of such character and amount as are sufficient to show good faith.

44. Cultivation of the land for at least two years is required, and this must generally consist of actual breaking of the soil, followed by planting, sowing of seed, and tillage for a crop other than native grasses. However, tilling of the land, or other appropriate treatment, for the purpose of conserving the moisture with a view of making a profitable crop the succeeding year, will be deemed cultivation within the terms of the act (without sowing of seed); where that manner of cultivation is necessary or generally followed in the locality. During the second year not less than one-sixteenth of the area entered must be actually cultivated, and during the third year, and until final proof, cultivation of not less than one-eighth must be had. These requirements are applicable to all cases, without regard to the area or location of the entry. The period of cultivation, like that of residence, may begin before the allowance of the application for relief; credit for all cultivation, if in accordance with the provisions of the three-year homestead law, will be allowed, without regard to the time when it was performed.

45. If the entry is situated in the States of Utah or Idaho, and the lands involved have been, or shall be, designated as being of the character subject to entry under the sixth sections of the acts of February 19, 1909 (35 Stat. 639), as amended, or June 17, 1910 (36 Stat. 531), respectively, the entryman may avail himself of the privileges of these sections, upon a proper showing of the character of the land, as required of a homestead applicant thereunder, in which event residence need not be maintained upon the land, but the amount of cultivation required is double that in ordinary cases and must be shown during a period of four years. For further details, reference should be made to the circular of this office known as "Suggestions to homesteaders," copies of which may be obtained of this office or any local land office.

46. If an entryman dies before being authorized to exercise the rights conferred by the second and third paragraphs, or after such authorization but before he has perfected his entry, his rights will pass to those persons who would inherit his lands according to the laws of the State wherein the entry is located or, if he leaves a will, to those to whom he devises such rights. Applications for the benefits of the new law may be filed, and proofs thereunder may be submitted either by one of the heirs in behalf of all, by a guardian of the heirs' estate if they themselves are minors, or by the entryman's

executor or administrator, acting under the supervision of the proper probate court.

The heirs or devisees will not be required to settle or reside upon the land, but must show that the land has been cultivated and improved by them or on their behalf, as required by the homestead law, for such period as will, when added to the entryman's period of compliance with the law, aggregate the required term of three years. If they desire to commute the entry, they must show a 14 months' period of such residence and cultivation on the part of themselves or the entryman, or both, as would have been required of him had he survived.

With regard to the reduction of the required area of cultivation, the same rules and procedure will be followed as in homestead cases.

47. The same fees, and no others, may be charged by registers and receivers upon submission of final proofs under the new law as upon submission of ordinary desert-land proofs. (See par. 33.) No commissions may be charged under any circumstances and no testimony fees unless the proof is taken at the land office.

#### ENTRIES PERFECTED BY PURCHASE

48. If claimant elects to perfect his entry under the third paragraph he must, within five years from the date of his election and payment of the sum of 50 cents per acre, make final proof and pay to the receiver the further sum of 75 cents for each acre of land embraced in his entry. The final proof, in order to be acceptable, must show that, at the date of the proof, the claimant has upon the tract permanent improvements conducive to the agricultural development thereof, of the value of at least \$1.25 per acre, and that he has in good faith used the land for agricultural purposes for at least three years. Under this third paragraph grazing will be regarded as an agricultural use, provided it be established that the land is best suited to that purpose and has been so used in good faith. Actual residence on the land need not be shown.

49. Improvements made during the first three years of the life of the entry and used as the basis of annual proof, if permanent in character and conducive to the agricultural development of the land, may be counted as improvements required to be shown under this section, provided their character and continued existence are satisfactorily established by the final proof; but no water rights or irrigation ditches will be recognized for this purpose unless it is clearly shown that they have been made actually conducive to the agricultural development of the land, or a portion thereof, and that that fact is not inconsistent with the truth of the claimant's preliminary showing that there was no reasonable prospect that he could acquire a sufficient water supply to irrigate the irrigable land of his entry.

50. If a claimant fails to make final proof and payment, as required by the third paragraph, within the five-year period, all sums theretofore paid by him will be forfeited and the entry canceled.

#### FORM OF PROOFS

51. Final proofs under the second paragraph may be made on the forms used in homestead cases. For final proofs to be made under the third paragraph special forms have been provided.

## CONTESTS AND RELINQUISHMENTS

52. Contests may be initiated by any person seeking to acquire title to or claiming an interest in the land involved against a party to any desert-land entry because of priority of claim or for any sufficient cause affecting the legality or validity of the claim not shown by the records of the Land Department.

Successful contestants will be allowed a preference right of entry for 30 days after notice of the cancellation of the contested entry, in the same manner as in homestead cases, and the register will give the same notice and is entitled to the same fee for notice as in other cases.

53. A desert-land entry may be relinquished at any time by the party owning the same, and when relinquishments are filed in the local land office the entries will be canceled by the register and receiver in the same manner as in homestead, preemption, and other cases under the first section of the act of May 14, 1880 (21 Stat. 140). Conditional relinquishments will not be accepted.

54. All previous rulings and instructions not in harmony herewith are hereby vacated.

WILLIAM SPRY,  
*Commissioner.*

Approved: May 20, 1924.

E. C. FINNEY,  
*First Assistant Secretary.*

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STATUTES

**An Act to Provide for the Sale of Desert Lands in Certain States and Territories**

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That it shall be lawful for any citizen of the United States, or any person of requisite age "who may be entitled to become a citizen, and who has filed his declaration to become such" and upon payment of twenty-five cents per acre, to file a declaration under oath with the register and the receiver of the land district in which any desert land is situated that he intends to reclaim a tract of desert land not exceeding one section,<sup>1</sup> by conducting water upon the same, within the period of three years<sup>2</sup> thereafter: *Provided, however,* That the right to the use of water by the person so conducting the same on or to any tract of desert land of six hundred and forty acres shall depend upon bona fide prior appropriation; and such right shall not exceed the amount of water actually appropriated and necessarily used for the purpose of irrigation and reclamation; and all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers, and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining, and manu-

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<sup>1</sup>Limited to 320 acres by act of March 3, 1891 (26 Stat. 1095).

<sup>2</sup>Time extended to four years by act of March 3, 1891, *supra*.

facturing purposes subject to existing rights. Said declaration shall describe particularly said section of land if surveyed, and, if unsurveyed,<sup>3</sup> shall describe the same as nearly as possible without a survey. At any time within the period of three years after filing said declaration, upon making satisfactory proof to the register and receiver of the reclamation of said tract of land in the manner aforesaid, and upon the payment to the receiver of the additional sum of one dollar per acre for a tract of land not exceeding six hundred and forty acres to any one person, a patent for the same shall be issued to him: *Provided*, That no person shall be permitted to enter more than one tract of land and not to exceed six hundred and forty acres, which shall be in compact form.

SEC. 2. That all lands, exclusive of timberlands and mineral lands, which will not, without irrigation, produce some agricultural crop shall be deemed desert lands within the meaning of this act, which fact shall be ascertained by proof of two or more credible witnesses under oath, whose affidavits shall be filed in the land office in which said tract of land may be situated.

SEC. 3. That this act shall only apply to and take effect in the States of California, Oregon, and Nevada, and the Territories of Washington, Idaho, Montana, Utah, Wyoming, Arizona, New Mexico, and Dakota, and the determination of what may be considered desert land shall be subject to the decision and regulation of the Commissioner of the General Land Office.

Approved, March 3, 1877. (19 Stat. 377.)

#### Three Hundred and Twenty Acre Limitation

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

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No person who shall, after the passage of this act, enter upon any of the public lands with a view to occupation, entry, or settlement under any of the land laws shall be permitted to acquire title to more than three hundred and twenty acres in the aggregate, under all of said laws, but this limitation shall not operate to curtail the right of any person who has heretofore made entry or settlement on the public lands, or whose occupation, entry, or settlement is validated by this act: *Provided*, That in all patents for lands hereafter taken up under any of the land laws of the United States or on entries or claims validated by this act, west of the one hundredth meridian, it shall be expressed that there is reserved from the lands in said patent described a right of way thereon for ditches or canals constructed by the authority of the United States.

Approved, August 30, 1890. (26 Stat. 391.)

#### An Act to Repeal Timber Culture Laws, and for Other Purposes

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SEC. 2. That an act to provide for the sale of desert lands in certain States and Territories, approved March third, eighteen hundred

<sup>3</sup> Right of entry restricted to surveyed land by act of March 28, 1908 (35 Stat. 52).

and seventy-seven, is hereby amended by adding thereto the following sections:

"SEC. 4. That at the time of filing the declaration hereinbefore required the party shall also file a map of said land which shall exhibit a plan showing the mode of contemplated irrigation, and which plan shall be sufficient to thoroughly irrigate and reclaim said land, and prepare it to raise ordinary agricultural crops, and shall also show the source of the water to be used for irrigation and reclamation. Persons entering or proposing to enter separate sections or fractional parts of sections of desert lands may associate together in the construction of canals and ditches for irrigating and reclaiming all of said tracts, and may file a joint map or maps showing their plan of internal improvements.

"SEC. 5. That no land shall be patented to any person under this act unless he or his assignors shall have expended in the necessary irrigation, reclamation, and cultivation thereof, by means of main canals and branch ditches, and in permanent improvements upon the land, and in the purchase of water rights for the irrigation of the same, at least three dollars per acre of whole tract reclaimed and patented in the manner following: Within one year after making entry for such tract of desert land as aforesaid, the party so entering shall expend not less than one dollar per acre for the purposes aforesaid; and he shall in like manner expend the sum of one dollar per acre during the second and also during the third year thereafter, until the full sum of three dollars per acre is so expended. Said party shall file during each year with the register proof, by the affidavits of two or more credible witnesses, that the full sum of one dollar per acre has been expended in such necessary improvements during such year, and the manner in which expended, and at the expiration of the third year a map or plan showing the character and extent of such improvements. If any party who has made such application shall fail during any year to file the testimony aforesaid, the lands shall revert to the United States, and the twenty-five cents advanced payment shall be forfeited to the United States, and the entry shall be canceled. Nothing herein contained shall prevent a claimant from making his final entry and receiving his patent at an earlier date than hereinbefore prescribed, provided that he then makes the required proof of reclamation to the aggregate extent of three dollars per acre: *Provided*, That proof be further required of the cultivation of one-eighth of the land.

"SEC. 6. That this act shall not affect any valid rights heretofore accrued under said act of March third, eighteen hundred and seventy-seven, but all bona fide claims heretofore lawfully initiated may be perfected, upon due compliance with the provisions of said act, in the same manner, upon the same terms and conditions, and subject to the same limitations, forfeitures, and contests as if this act had not been passed; or said claims, at the option of the claimant may be perfected and patented under the provisions of said act, as amended by this act, so far as applicable; and all acts and parts of acts in conflict with this act are hereby repealed.

"SEC. 7. That at any time after filing the declaration, and within the period of four years thereafter, upon making satisfactory proof to the register and the receiver of the reclamation and cultivation of

said land to the extent and cost and in the manner aforesaid, and substantially in accordance with the plans herein provided for, and that he or she is a citizen of the United States, and upon payment to the receiver of the additional sum of one dollar per acre for said land, a patent shall issue therefor to the applicant or his assigns; but no person or association of persons shall hold, by assignment or otherwise prior to the issue of patent, more than three hundred and twenty acres of such arid or desert lands; but this section shall not apply to entries made or initiated prior to the approval of this act: *Provided however*, That additional proofs may be required at any time within the period prescribed by law, and that the claims or entries made under this or any preceding act shall be subject to contest as provided by the law relating to homestead cases, for illegal inception, abandonment, or failure to comply with the requirements of law, and upon satisfactory proof thereof shall be canceled and the lands and moneys paid therefor shall be forfeited to the United States.

"SEC. 8. That the provisions of the act to which this is an amendment, and the amendments thereto, shall apply to and be in force in the State of Colorado, as well as the States named in the original act; and no person shall be entitled to make entry of desert land except he be a resident citizen of the State or Territory in which the land sought to be entered is located."<sup>1</sup>

Approved, March 3, 1891. (26 Stat. 1095.)

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Section 2294, United States Revised Statutes, as Amended by the Act of March 11, 1902 (32 Stat. 63), the Act of March 4, 1904 (33 Stat. 59), and the Act of February 23, 1923 (42 Stat. 1282)

SEC. 2294. That hereafter all proofs, affidavits, and oaths of any kind whatsoever required to be made by applicants and entrymen under the homestead, preemption, timber culture, desert land, and timber and stone acts, may in addition to those now authorized to take such affidavits, proofs, and oaths be made before any United States commissioner or commissioner of the court exercising Federal jurisdiction in the Territory or before the judge or clerk of any court of record in the county, parish, or land district in which the lands are situated: *Provided*, That in cases where because of geographic or topographic conditions there is a qualified officer nearer or more accessible to the land involved, but outside the county and land district, affidavits, proofs, and oaths may be taken before such officer: *Provided further*, That in case the affidavits, proofs, and oaths hereinbefore mentioned be taken outside of the county or land district in which the land is located the applicant must show by affidavit satisfactory to the Commissioner of the General Land Office that it was taken before the nearest or most accessible officer qualified to take such affidavits, proofs, and oaths; but such showing by affidavit need not be made in making final proof if the proof be taken in the town or city where the newspaper is published in which the final proof notice is printed. The proof, affidavit, and oath, when so made and duly subscribed, or which may have heretofore been so made and duly subscribed, shall have the same force and effect as if made before the register and receiver when transmitted to them with the

<sup>1</sup> Excepting in the State of Nevada. Act of January 6, 1921 (41 Stat. 1086).

fees and commissions allowed and required by law. That if any witness making such proof, or any applicant making such affidavit or oath, shall knowingly, willfully, or corruptly swear falsely to any material matter contained in said proofs, affidavits, or oaths he shall be deemed guilty of perjury and shall be liable to the same pains and penalties as if he had sworn falsely before the register. That the fees for entries and for final proofs, when made before any other officer than the register and receiver, shall be as follows:

For each affidavit, 25 cents.

For each deposition of claimant or witness, when not prepared by the officer, 25 cents.

For each deposition of claimant or witness prepared by the officer, \$1.

Any officer demanding or receiving a greater sum for such service shall be guilty of misdemeanor and upon conviction shall be punished for each offense by a fine not exceeding \$100.

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**An Act Limiting and Restricting the Right of Entry and Assignment Under the Desert Land Law and Authorizing an Extension of Time Within Which to Make Final Proof.**

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That from and after the passage of this act the right to make entry of desert lands under the provisions of the act approved March third, eighteen hundred and seventy-seven, entitled "An act to provide for the sale of desert lands in certain States and Territories," as amended by the act approved March third, eighteen hundred and ninety-one, entitled "An act to repeal timber culture laws, and for other purposes," shall be restricted to surveyed public lands of the character contemplated by said acts, and no such entries of unsurveyed lands shall be allowed or made of record: *Provided, however,* That any individual qualified to make entry of desert lands under said acts who has, prior to survey, taken possession of a tract of unsurveyed desert land not exceeding in area three hundred and twenty acres in compact form, and has reclaimed or has in good faith commenced the work of reclaiming the same, shall have the preference right to make entry of such tract under said acts, in conformity with the public-land surveys, within ninety days after the filing of the approved plat of survey in the district land office.

SEC. 2. That from and after the date of the passage of this act no assignment of an entry made under said acts shall be allowed or recognized, except it be to an individual who is shown to be qualified to make entry under said acts of the land covered by the assigned entry, and such assignments may include all or part of an entry; but no assignment to or for the benefit of any corporation or association shall be authorized or recognized.

SEC. 3. That any entryman under the above acts who shall show to the satisfaction of the Commissioner of the General Land Office that he has in good faith complied with the terms, requirements, and provisions of said acts, but that because of some unavoidable delay in the construction of the irrigating works intended to convey water to the said lands he is without fault on his part unable to make

proof of the reclamation and cultivation of said land as required by said acts, shall upon filing his corroborated affidavit with the land office in which said land is located, setting forth said facts, be allowed an additional period of not to exceed three years, within the discretion of the Commissioner of the General Land Office, within which to furnish proof, as required by said acts, of the completion of said work.

Approved, March 28, 1908. (35 Stat. 52.)

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#### An Act for the Protection of the Surface Rights of Entrymen

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That any person who has in good faith located, selected, or entered under the non-mineral land laws of the United States any lands which subsequently are classified, claimed, or reported as being valuable for coal may, if he shall so elect, and upon making satisfactory proof of compliance with the laws under which such lands are claimed, receive a patent therefor, which shall contain a reservation to the United States of all coal in said lands and the right to prospect for, mine, and remove the same. The coal deposits in such lands shall be subject to disposal by the United States in accordance with the provisions of the coal land laws in force at the time of such disposal, but no person shall enter upon said lands to prospect for or mine and remove coal therefrom without previous consent of the owner under such patent except upon such conditions as to security for and payment of all damages to such owner caused thereby as may be determined by a court of competent jurisdiction: *Provided*, That the owner under such patent shall have the right to mine coal for use on the land for domestic purposes prior to the disposal by the United States of the coal deposit: *Provided further*, That nothing herein contained shall be held to affect or abridge the right of any locator, selector, or entryman to a hearing for the purpose of determining the character of the land located, selected, or entered by him. Such locator, selector, or entryman who has heretofore made or shall hereafter make final proof showing good faith and satisfactory compliance with the law under which his land is claimed shall be entitled to a patent without reservation unless at the time of such final proof and entry it shall be shown that the land is chiefly valuable for coal.

Approved, March 3, 1909. (35 Stat. 844.)

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#### An Act to Provide for Agricultural Entries on Coal Lands

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That from and after the passage of this act unreserved public lands of the United States, exclusive of Alaska, which have been withdrawn or classified as coal lands, or are valuable for coal, shall be subject to appropriate entry under the homestead laws by actual settlers only, the desert land law, to selection under section four of the act approved August eighteenth, eighteen hundred and ninety-four, known as the

Carey Act, and to withdrawal under the act approved June Seventeenth, nineteen hundred and two, known as the reclamation act, whenever such entry, selection, or withdrawal shall be made with a view of obtaining or passing title, with a reservation to the United States of the coal in such lands and of the right to prospect for, mine, and remove the same. But no desert entry made under the provisions of this act shall contain more than one hundred and sixty acres, and all homestead entries made hereunder shall be subject to the conditions, as to residence and cultivation, of entries under the act approved February nineteenth, nineteen hundred and nine, entitled "An act to provide for an enlarged homestead": *Provided*, That those who have initiated nonmineral entries, selections, or locations in good faith, prior to the passage of this act, on lands withdrawn or classified as coal lands may perfect the same under the provisions of the laws under which said entries were made, but shall receive the limited patent provided for in this act.

SEC. 2. That any person desiring to make entry under the homestead laws or the desert land law, any State desiring to make selection under section four of the act of August eighteenth, eighteen hundred and ninety-four, known as the Carey Act, and the Secretary of the Interior in withdrawing under the reclamation act lands classified as coal lands, or valuable for coal, with a view of securing or passing title to the same in accordance with the provisions of said acts, shall state in the application for entry, selection, or notice of withdrawal that the same is made in accordance with and subject to the provisions and reservation of this act.

SEC. 3. That upon satisfactory proof of full compliance with the provisions of the laws under which entry is made, and of this act, the entryman shall be entitled to a patent to the land entered by him, which patent shall contain a reservation to the United States of all the coal in the lands so patented, together with the right to prospect for, mine, and remove the same. The coal deposits in such lands shall be subject to disposal by the United States in accordance with the provisions of the coal land laws in force at the time of such disposal. Any person qualified to acquire coal deposits or the right to mine and remove coal under the laws of the United States shall have the right, at all times, to enter upon the lands selected, entered, or patented, as provided by this act, for the purpose of prospecting for coal thereon upon the approval by the Secretary of the Interior of a bond or undertaking to be filed with him as security for the payment of all damages to the crops and improvements on such lands by reason of such prospecting. Any person who has acquired from the United States the coal deposits in any such land, or the right to mine or remove the same, may reenter and occupy so much of the surface thereof as may be required for all purposes reasonably incident to the mining and removal of the coal therefrom, and mine and remove the coal, upon payment of the damages caused thereby to the owner thereof, or upon giving a good and sufficient bond or undertaking in an action instituted in any competent court to ascertain and fix said damages: *Provided*, That the owner under such limited patent shall have the right to mine coal for use upon the land for domestic purposes at any time prior to the disposal by the United States of the coal deposits: *Provided*

*further*, That nothing herein contained shall be held to deny or abridge the right to present and have prompt consideration of applications to locate, enter, or select, under the land laws of the United States, lands which have been classified as coal lands with a view of disproving such classification and securing a patent without reservation.

Approved, June 22, 1910. (36 Stat. 583.)

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**An Act Authorizing the Secretary of the Interior to Grant Further Extension of Time Within Which to Make Proof on Desert-Land Entries**

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the Secretary of the Interior may, in his discretion, in addition to the extension authorized by existing law, grant to any entryman under the desert land laws a further extension of the time within which he is required to make final proof: *Provided*, That such entryman shall, by his corroborated affidavit filed in the land office of the district where such land is located, show to the satisfaction of the Secretary that because of unavoidable delay in the construction of irrigation works intended to convey water to the land embraced in his entry he is, without fault on his part, unable to make proof of the reclamation and cultivation of said lands as required by law within the time limited therefor; but such extension shall not be granted for a period of more than three years, and this act shall not affect contests initiated for a valid existing reason: *Provided*, That the total extension of the statutory period for making final proof that may be allowed in any one case under this act, and any other existing statutes of either general or local application, shall be limited to six years in the aggregate.

Approved, April 30, 1912. (37 Stat. 106.)

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**An Act to Provide for Agricultural Entry of Lands Withdrawn, Classified, or Reported as Containing Phosphate, Nitrate, Potash, Oil, Gas, or Asphaltic Minerals**

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That lands withdrawn or classified as phosphate, nitrate, potash, oil, gas, or asphaltic minerals, or which are valuable for those deposits, shall be subject to appropriation, location, selection, entry, or purchase, if otherwise available, under the nonmineral land laws of the United States, whenever such location, selection, entry, or purchase shall be made with a view of obtaining or passing title with a reservation to the United States of the deposits on account of which the lands were withdrawn or classified or reported as valuable, together with the right to prospect for, mine, and remove the same; but no desert entry made under the provisions of this act shall contain more than one hundred and sixty acres: *Provided*, That all applications to locate, select, enter, or purchase under this section shall state that

the same are made in accordance with and subject to the provisions and reservations of this act.

SEC. 2. That upon satisfactory proof of full compliance with the provisions of the laws under which the location, selection, entry, or purchase is made, the locator, selector, entryman, or purchaser shall be entitled to a patent to the land located, selected, entered, or purchased, which patent shall contain a reservation to the United States of the deposits on account of which the lands so patented were withdrawn or classified or reported as valuable, together with the right to prospect for, mine, and remove the same, such deposits to be subject to disposal by the United States only as shall be hereafter expressly directed by law. Any person qualified to acquire the reserved deposits may enter upon said lands with a view of prospecting for the same upon the approval by the Secretary of the Interior of a bond or undertaking to be filed with him as security for the payment of all damages to the crops and improvements on such lands by reason of such prospecting, the measure of any such damage to be fixed by agreement of parties or by a court of competent jurisdiction. Any person who has acquired from the United States the title to or the right to mine and remove the reserved deposits, should the United States dispose of the mineral deposits in lands, may re-enter and occupy so much of the surface thereof as may be required for all purposes reasonably incident to the mining and removal of the minerals therefrom and mine and remove such minerals, upon payment of damages caused thereby to the owner of the land, or upon giving a good and sufficient bond or undertaking therefor in an action instituted in any competent court to ascertain and fix said damages: *Provided*, That nothing herein contained shall be held to deny or abridge the right to present and have prompt consideration of applications to locate, select, enter, or purchase, under the land laws of the United States, lands which have been withdrawn or classified as phosphate, nitrate, potash, oil, gas, or asphaltic mineral lands, with a view of disproving such classification and securing patent without reservation, nor shall persons who have located, selected, entered, or purchased lands subsequently withdrawn, or classified as valuable for said mineral deposits, be debarred from the privilege of showing, at any time before final entry, purchase, or approval of selection or location, that the lands entered, selected, or located are in fact nonmineral in character.

SEC. 3. That any person who has, in good faith, located, selected, entered, or purchased, or any person who shall hereafter locate, select, enter, or purchase, under the nonmineral land laws of the United States, any lands which are subsequently withdrawn, classified, or reported as being valuable for phosphate, nitrate, potash, oil, gas, or asphaltic minerals, may, upon application therefor, and making satisfactory proof of compliance with the laws under which such lands are claimed, receive a patent therefor, which patent shall contain a reservation to the United States of all deposits on account of which the lands were withdrawn, classified, or reported as being valuable, together with the right to prospect for, mine, and remove the same.

Approved, July 17, 1914. (38 Stat. 509.)

**An Act Providing for Second Homestead and Desert-Land Entries**

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That any person otherwise duly qualified to make entry or entries of public lands under the homestead or desert land laws, who has heretofore made or may hereafter make entry under said laws, and who, through no fault of his own, may have lost, forfeited, or abandoned the same, or who may hereafter lose, forfeit, or abandon same, shall be entitled to the benefits of the homestead or desert land laws as though such former entry or entries had never been made: *Provided*, That such applicant shall show to the satisfaction of the Secretary of the Interior that the prior entry or entries were made in good faith, were lost, forfeited, or abandoned because of matters beyond his control, and that he has not speculated in his right nor committed a fraud or attempted fraud in connection with such prior entry or entries.

Approved, September 5, 1914. (38 Stat. 712.)

**An Act Making Appropriations to Supply Deficiencies in Appropriations for the Fiscal Year Nineteen Hundred and Fifteen and for Prior Years, and for Other Purposes**

\* \* \* \* \*

That the Secretary of the Interior may, in his discretion, extend the time within which final proof is required to be submitted upon any lawful pending desert-land entry made prior to July first, nineteen hundred and fourteen, such extension not to exceed three years from the date of allowance thereof: *Provided*, That the entryman or his duly qualified assignee has, in good faith, complied with the requirements of law as to yearly expenditures and proof thereof, and shall show, under rules and regulations to be prescribed by the Secretary of the Interior, that there is a reasonable prospect that, if the extension is granted, he will be able to make the final proof of reclamation, irrigation, and cultivation required by law: *Provided further*, That the foregoing shall apply only to cases wherein an extension or further extension of time may not properly be allowed under existing law.

That where it shall be made to appear to the satisfaction of the Secretary of the Interior, under rules and regulations to be prescribed by him, with reference to any lawful pending desert-land entry made prior to July first, nineteen hundred and fourteen, under which the entryman or his duly qualified assignee under an assignment made, prior to the date of this act has, in good faith, expended the sum of \$3 per acre in the attempt to effect reclamation of the land, that there is no reasonable prospect that, if the extension allowed by this act or any existing law were granted, he would be able to secure water sufficient to effect reclamation of the irrigable land in his entry or any legal subdivision thereof, the Secretary of the Interior may, in his discretion, allow such entryman or assignee five years from notice within which to perfect the entry in the manner required of a homestead entryman.

That any desert-land entryman or his assignee entitled to the benefit of the last preceding paragraph may, if he shall so elect within

sixty days from the notice therein provided, pay to the receiver of the local land office the sum of 50 cents per acre for each acre embraced in the entry, and thereafter perfect such entry upon proof that he has upon the tract permanent improvements conducive to the agricultural development thereof of the value of not less than \$1.25 per acre, and that he has in good faith used the land for agricultural purposes for three years, and the payment to the receiver at the time of final proof of the sum of 75 cents per acre: *Provided*, That in such case final proof may be submitted at any time within five years from the date of the entryman's election to proceed as provided in this section, and in the event of failure to perfect the entry as herein provided all moneys theretofore paid shall be forfeited and the entry canceled.

Approved, March 4, 1915. (38 Stat. 1138-1161.)

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see H-16301

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An Act Relating to Desert-Land Entries - Dec 5210510

Letter of Feb 6 1932 to John M. Evans: see page 445 here

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the right to make a desert-land entry shall not be denied to any applicant therefor who has already made an enlarged homestead entry of three hundred and twenty acres: *Provided*, That said applicant is a duly qualified entryman and the whole area to be acquired as an enlarged homestead entry and under the provisions of this act does not exceed four hundred and eighty acres.

Approved, February 27, 1917. (39 Stat. 946.)

An Act to Amend an Act Entitled "An Act Making Appropriations to Supply Deficiencies in Appropriations for the Fiscal Year Nineteen Hundred and Fifteen and for Prior Years, and for Other Purposes"

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the provisions of the last three paragraphs of section five of the act of March fourth, nineteen hundred and fifteen, "An act making appropriations to supply deficiencies in appropriations for the fiscal year nineteen hundred and fifteen and for prior years, and for other purposes," be, and the same are hereby, extended and made applicable to any lawful pending desert-land entry made prior to March fourth, nineteen hundred and fifteen: *Provided*, That in cases where such entries have been assigned prior to the date of the act the assignees shall, if otherwise qualified, be entitled to the benefit hereof.

Approved, March 21, 1918. (40 Stat. 458.)

An Act to Promote the Mining of Coal, Phosphate, Oil, Oil Shale, Gas, and Sodium on the Public Domain

\* \* \* \* \*

SEC. 29. That any permit, lease, occupation, or use permitted under this act shall reserve to the Secretary of the Interior the right to permit upon such terms as he may determine to be just, for joint

or several use, such easements or rights of way, including easements in tunnels upon, through, or in the lands leased, occupied, or used as may be necessary or appropriate to the working of the same, or of other lands containing the deposits described in this act, and the treatment and shipment of the products thereof by or under authority of the Government, its lessees, or permittees, and for other public purposes: *Provided*, That said Secretary, in his discretion, in making any lease under this act, may reserve to the United States the right to lease, sell, or otherwise dispose of the surface of the lands embraced within such lease under existing law or laws hereafter enacted, in so far as said surface is not necessary for use of the lessee in extracting and removing the deposits therein: *Provided further*, That if such reservation is made it shall be so determined before the offering of such lease: *And provided further*, That the said Secretary, during the life of the lease, is authorized to issue such permits for easements herein provided to be reserved.

\* \* \* \* \*

Approved February 25, 1920. (41 Stat. 437.)

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**An Act to Amend Section 8 of An Act to Provide for the Sale of Desert Lands in Certain States and Territories, Approved March 3, 1877; as Amended by An Act to Repeal Timber Culture Laws, and for Other Purposes, Approved March 3, 1891**

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That section 8 of an act to provide for the sale of desert lands in certain States and Territories approved March 3, 1877, as amended by an act to repeal timber culture laws, and for other purposes, approved March 3, 1891, be, and the same is hereby, amended so as to read as follows:

"SEC. 8. That the provisions of the act to which this is an amendment, and the amendments thereto, shall apply to and be in force in the State of Colorado, as well as the States named in the original act; and, excepting in the State of Nevada, no person shall be entitled to make entry of desert lands unless he be a resident citizen of the State or Territory in which the land sought to be entered is located."

Approved January 6, 1921. (41 Stat. 1086.)

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**An Act to Authorize Certain Desert-Land Claimants Who Entered the Military or Naval Service of the United States During the War with Germany to Make Final Proof of Their Entries**

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the act of March 1, 1921 (Forty-first Statutes, page 1202), entitled "An act to authorize certain homestead settlers or entrymen who entered the military or naval service of the United States during the war with Germany to make final proof of their entries," be, and the same is hereby, amended by adding thereto at the end thereof the following matter, which shall be known and designated as section 2 of said act:

"SEC. 2. That any entryman under the desert land laws, or any person entitled to preference right of entry under section 1 of the

act approved March 28, 1908 (Thirty-fifth Statutes at Large, page 52), who after application or entry for surveyed lands or legal initiation of claim for unsurveyed lands, and prior to November 11, 1918, enlisted or was actually engaged in the United States Army, Navy, or Marine Corps during the war with Germany, who has been honorably discharged, and because of physical incapacities due to service is unable to accomplish reclamation of and payment for the land, may make proof without further reclamation thereof or payments thereon under such rules and regulations as may be prescribed by the Secretary of the Interior, and receive patent for the land by him so entered or claimed, if found entitled thereto: *Provided, That* no such patent shall issue prior to the survey of the land."

Approved December 15, 1921. (42 Stat. 348.)

## A. R. BOWDRE ET AL.

Decided May 21, 1924.

## WARRANT—SCRIP—RECORDS—EVIDENCE.

Where the records of the General Land Office fail to show that the locator of a military bounty land warrant complied with the requirements of the regulations relating to the location thereof, no presumption will arise that such location was perfected so as to vest equitable title to the located land in the locator.

## WARRANT—SCRIP—VESTED RIGHTS—TAXATION.

The United States is not divested of its equitable title to public land until there has been a full compliance with all the conditions upon which the right to title depends, and, prior to that time, a tax imposed upon the land by a State is void.

## WARRANT—SCRIP—PURCHASER—TAX SALE.

Where the equitable title to a tract of land located under a military bounty land warrant fails to pass to the locator because the location was not perfected, a purchaser of the land at a tax sale by the State who is not in privity with the warrant locator is not entitled to make cash substitution.

## PUBLIC LANDS—POSSESSION—OCCUPANCY—IMPROVEMENTS—PREFERENCE RIGHT—LAND DEPARTMENT—SUPERVISORY AUTHORITY.

The department will recognize a preferred right to initiate and perfect title in one who in good faith under color of title has taken possession of, occupied and improved public land under misunderstanding or misinformation as to his legal rights, and it is vested with the discretion to hold the title in the United States until he may be enabled to acquire title under existing law or by special act of Congress.

GOODWIN, *Assistant Secretary*:

M. H. Dean, as attorney at law for A. R. Bowdre, the estate of M. C. Reece, and for Ida Reece, has requested that patent be issued for the NE.  $\frac{1}{4}$ , Sec. 5, T. 6 N., R. 15 W., Little Rock, Arkansas, land district.

The Commissioner of the General Land Office denied the request and Dean has appealed in their behalf.

The facts as shown by the records of the General Land Office appear to be as follows: The abstract of warrants returned by the local officers at Little Rock for June, 1848, showed that on June 14, 1848, Samuel Pipkin presented for location on the NE.  $\frac{1}{4}$ , Sec. 5, T. 6 N., R. 15 W., military bounty land warrant No. 9084, issued December 31, 1847, to Michael Freeman for 160 acres under the act of February 11, 1847 (9 Stat., 123, 125). Such abstract does not show that the warrant was ever satisfied. There is posted on the tract book of the General Land Office a notation of the location of his warrant by Pipkin on the date mentioned. This posting was made from a duplicate copy of the abstract of warrants located at the local land office during June, 1848. It also appears that by letter of September 26, 1848, the Commissioner returned warrant certificate 9084

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with three others to the local office, stating: "You will perceive that in all these cases that the application has not been endorsed upon the certificate as directed by the printed circular of June 3, 1847." The circular mentioned required "the party to indorse on the warrant certificate an application to the following effect: 'I, A. B., of ———, hereby locate the ——— containing ——— acres, in satisfaction of the warrant herein mentioned,'" which was to be signed by the party and attested by the local officers. (1 Lester's Land Laws and Decisions, 577.)

Under date of January 22, 1858, the register of the local office in reply to the Commissioner's letter of December 17, 1857, calling for the abstract of warrants located in June, 1848, register and receiver numbers 33 to 36, inclusive, which were returned with the aforesaid letter of September 26, 1848, stated that he had made diligent search and was unable to locate the abstract of warrants and reported that he was unable to find that they had been received in his office or returned after having been received. One of the warrants, however, designated in the Commissioner's letter of September 26, 1848, is in the files of the General Land Office and is shown to have been satisfied, and it therefore may be presumed that the letter mentioned with the inclosed warrants was received by the local officers. No record can be found showing that a patent issued on warrant location 9084 nor that the defect in the location mentioned in the letter was ever cured. The warrant 9084 and all papers in connection therewith can not be found in the files of the General Land Office.

In response to requirements laid down by the Commissioner relative to the source of their title, the claimants have filed a duly certified abstract of title and a certificate by the county clerk and recorder relative to the record title affecting the land in question. These showings disclose that the claimants herein derived their title from the purchaser of the land at a sale on June 10, 1873, by the collector of taxes, the land having been assessed to an unknown owner; that the record of title to E.  $\frac{1}{2}$  NE.  $\frac{1}{4}$  is in A. R. Bowdre, that the record title to the NW.  $\frac{1}{4}$  NE.  $\frac{1}{4}$  is in M. C. Reece, and the record title to the SW.  $\frac{1}{4}$  NE.  $\frac{1}{4}$  is in Ida Reece.

It further appears from the abstract of title that the W.  $\frac{1}{2}$  NE.  $\frac{1}{4}$  is encumbered by mortgage liens and also subject to outstanding oil and gas leases given by the claimants. The showings were also supported by corroborated affidavits wherein it is alleged that the parties asking for patents and their grantors and predecessors in title of the respective tracts have been in actual, open, notorious, hostile, and exclusive possession of said lands for more than 25 years, said possession being continuous and undisturbed during said time, and that no adverse claim has been set up to said property.

The Commissioner held that it was essential that the present claimants show that they derived title through the warrant location; that as the warrant was returned for "illegality" not shown to have been cured, the tax sale was void and the purchaser took nothing; that the present claimant not being in privity with the warrant locator can not be permitted to make cash substitution. The Commissioner, however, accorded the persons now in possession the right to enter the land under appropriate laws.

The controlling question that arises from the facts in this case is whether any title, equitable or legal, passed under the tax sale. If no such title passed, the present claimants, who have not connected themselves with the warrant locator, have none.

There is nothing to show that the warrant location was fully perfected or completed. The record shows that it was substantially defective, and it stands impeached on the face of the record. Conditions remained to be complied with upon which the right to patent depended. Something remained to be done by the locator before his equity was complete. There is no warrant for presuming that these things were done and that the location was ever perfected. A similar question was presented in the case of *Price et al. v. Dennis et al.* (Ala., 1909; 49 So., 248, 250), where the records of the General Land Office showed that the location under the warrant used was suspended by the Commissioner because of the insufficiency of the assignment of the warrant and it was held that the equity was never perfected until the assignment was made good.

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The State was without power to tax the land until the equitable title passed from the United States and the title did not pass until there was a full compliance with all the conditions upon which the right to patent depended. It follows that during the years intervening between the date of the location of the warrant and the date of the tax sale the United States held such an interest in the land as to make its taxation by the State void. *Hussman v. Durham* (165 U. S., 144), *Sargent v. Herrick* (221 U. S., 404.)

The claimants are not such parties in interest as may invoke the provisions of section 41 of the regulations governing the location of bounty land warrants (41 L. D., 34, 44), relating to cash substitution nor would a patent to the original locator, as therein provided, serve to vest the record title in these claimants.

It follows that as the present claimants can not perfect title to the land under the warrant location and have obtained no title under a void tax sale their request for patent must be denied.

Nevertheless, as it appears that the present claimants are in actual possession collectively of the land in question in good faith under claim of title, the land is not subject to appropriation by others under the public land laws while so occupied and claimed.

Furthermore, the Department is vested with the discretion under the circumstances here presented where the claimants appear to have been misinformed and misunderstood their rights and have improved the land and paid valuable consideration therefor to hold the title in the United States until, "within the limits of existing law or special act of Congress" the several occupants may be enabled to obtain title to the subdivisions to which they hold the color of title and which they occupy. *Williams v. United States* (138 U. S., 514, 524), *Northern Pacific Railway Company v. McComas* (250 U. S., 387, 393). The claimants will therefore be considered as having a preferred right to initiate and perfect title to the land. It is therefore incumbent upon them promptly to seek title to the tracts they claim under appropriate public land laws, it being advisable to state further that should the Land Department determine, as the showings of the applicants suggest, that one or more subdivisions of the land in question is valuable for oil and gas, rights to the same can only be acquired under a permit or lease as the case may require under the provisions of the act of February 25, 1920 (41 Stat., 437), and patent to the land will be issued in such case subject to oil and gas reservation.

In harmony with the views expressed the decision of the Commissioner directing the local officers to note the failure of the location on their records and denying the application for patent is affirmed.

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### STEPHEN E. DAY, JR., ET AL.

*Decided May 21, 1924.*

#### MINING CLAIM—PATENT.

Trap, or trap rock, a general name for dark fine-grained rock, found in broken-up fragments in a limited area, which is particularly suitable and can be profitably marketed for ballast, is, when the land in which it is contained is chiefly valuable for such, a valuable mineral deposit subject to appropriation and patent under the placer-mining laws.

#### COURT AND DEPARTMENTAL DECISIONS CITED AND APPLIED—DEPARTMENTAL DECISIONS DISTINGUISHED.

Cases of *Northern Pacific Railroad Company v. Soderberg* (188 U. S., 526), *Castle v. Womble* (19 L. D., 455), *Pacific Coast Marble Company v. Northern Pacific Railroad Company* (25 L. D., 233), and *Cataract Gold Mining Company* (43 L. D., 248), cited and applied; cases of *Zimmerman v. Brunson* (39 L. D., 310), and *Stanislaus Electric Power Company* (41 L. D., 655), distinguished.

#### FINNEY, *First Assistant Secretary*:

This is an appeal by Stephen E. Day, jr., *et al.* from the Commissioner's decision of January 7, 1924, holding for rejection their mineral application 033465, filed on September 29, 1923, for the

Radio placer mining claim, embracing lot 8, Sec. 4, and lot 1, Sec. 9, T. 22 S., R. 18 E., S. L. M., Salt Lake City land district, Utah, for the stated reason that trap rock, the deposit claimed and utilized for ballast purposes was not subject to appropriation under the mining laws as a mineral. The Commissioner cited the cases of Stanislaus Electric Power Company (41 L. D., 655), and Zimmerman v. Brunson (39 L. D., 310), and stated that the trap rock was on a par with ordinary gravel which could not be entered under the mining laws according to the case last mentioned.

The tracts involved comprise about 44 acres of land just south of the Denver and Rio Grande Railroad track and are situated approximately 14 miles easterly from Green River in eastern Utah. The claim was located in 1922 by Stephen E. Day, jr., and his two associates, who are now the applicants for patent. The location certificate dated November 29, 1922, recited that the claim was upon a valuable deposit of cement gravel. In the application for patent it is alleged that the placer claim bears a superior quality of trap rock suitable and used for ballasting purposes, for which the land is solely and wholly valuable; that the patent work consists of an excavated pit having an average width of 19 feet, 11 feet deep and 540 feet long, valued at \$600; that the mineral deposit referred to covers substantially the whole of the claim which is worthless for any other mineral or for any other purpose and that the soil is desert in character and there are no streams and no timber upon the land. In his affidavit of October 24, 1923, applicant Day avers that no portion of the claim is susceptible of cultivation and that nothing grows thereon except a few desert weeds; that there is disclosed throughout nearly the entire area a deposit of ballast rock many feet in thickness; that about 300 carloads, over 12,000 tons, of ballast rock have been shipped by the claimants through their lessees and used on the main line track of the railroad; and that the ballast is worth ten cents per ton on board the cars at the pit.

Since the appeal was taken counsel has been heard orally and additional evidence has been submitted. In a duly corroborated affidavit executed by said Day on March 25, 1924, it is alleged that the trap rock deposit has already been extracted to a depth of about 11 feet and extends indefinitely below so far as he can determine; that, excepting the patented Lorna Doone claim of 100 acres on the west and the Radio placer, there is, so far as affiant is informed, very little, if any, land containing the deposit; that immediately west of the Lorna Doone claim is a solid rock formation different entirely from the deposit here in question; that on the south line of the two claims the deposit thins out to such an extent as to render it valueless and that the extent of the deposit conforms to the basin in which

the claims were located and probably covers only a few acres outside the limits of the two locations. It is stated that the proximity of the railroad and the transcontinental highways affords an available market for the deposit. In a corroborating affidavit dated April 2, 1924, it is averred that the deposit is not in a solid formation but is in a loose, broken-up condition rendering crushing unnecessary.

It appears that trap, or trap rock, is a general name for dark, fine-grained igneous rocks, particularly lavas or dikes. See Glossary, Bureau of Mines, Bulletin 95. The Department understands that the deposit referred to as gravel consists of loose, broken-up fragments of hard rock particularly suitable for, and actually used as, ballast on the railroad.

The proof furnished indicates that the available deposit is practically limited to the area of the two claims mentioned. The Lorna Doone claim was entered in 1909 and patented in 1910. The favorable report of the special agent upon that claim showed that it covered a gravel deposit from which good track ballast was obtained and had no other value. The single question presented in this case is whether the deposit described constitutes a valuable mineral deposit within the purview of the mining statute.

In the case of *Pacific Coast Marble Company v. Northern Pacific Railroad Company* (25 L. D., 233) it was held (syllabus):

Whatever is recognized as a mineral by the standard authorities, whether of metallic or other substances, when found in the public lands in quantity and quality sufficient to render the land more valuable on account thereof than for agricultural purposes, must be treated as coming within the purview of the mining laws.

In the case of *Northern Pacific Railroad Company v. Soderberg* (188 U. S., 526, 536) the Supreme Court said that the overwhelming weight of authority was to the effect that mineral lands include all such as are chiefly valuable for their deposits of a mineral character which are useful in the arts or valuable for purposes of manufacture. In that case a deposit of granite was involved upon which a quarry had been opened.

The decision in the case of the *Cataract Gold Mining Company* (43 L. D., 248, 254) pointed out that in the *Stanislaus* case it was found that the stone had no commercial value and could not be transported and marketed at a profit, and after restating the principle set forth in *Castle v. Womble* (19 L. D., 455) the Department said:

The mineral deposit must be a "valuable" one; such a mineral deposit as can probably be worked profitably; for otherwise there would be no inducement or incentive for the mineral claimant to remove the minerals from the ground and place the same in the market, the evident intent and purpose of the mining laws.

It may be noted that in the Stanislaus case (41 L. D., 655) the application purported to be for a deposit of building stone specifically located and sought under the act of August 4, 1892 (27 Stat., 348). The stone was a low-grade granite, widely distributed, and possessed no particular value as a building stone. The land itself constituted a valuable power site and was being utilized for hydro-electric purposes. It was held that the land was not chiefly valuable for building stone, as was required by said act of 1892 in order to be subject to location and patent thereunder as a building-stone placer. In the course of that opinion the following appears, on page 660:

Furthermore, it is the undoubted purpose, intent, and scope of the mining laws to reserve from other disposition and to devote to mineral sale and exploitation only such lands as possess mineral deposits of special or peculiar value in trade, commerce, manufacture, science, or the arts.

The deposit upon the Radio placer and the adjoining claim is limited in extent and according to the showing is confined to the two claims. It is being excavated and utilized. It has a royalty value of 10 cents per ton of rock removed. The land possesses a positive value for the trap rock. The claim is not sought under the provisions of the building stone act or for any purpose other than the extraction of the trap rock. In these several respects the Stanislaus case is to be distinguished and is not controlling here.

In the Zimmerman-Brunson case a deposit of ordinary gravel and sand was involved. The deposit possessed no special or peculiar property or characteristic and its chief value was due to its proximity to a town. It had been used for making concrete and concrete blocks for building construction. The Department declined to classify as mineral land containing such a deposit and sustained the homestead entry made thereon. The ruling in that case is not deemed necessarily determinative of the present question.

This trap rock is something different from ordinary gravel. As the Department understands, it consists of a deposit in a loose and broken up state, the rock fragments being peculiarly adapted for railroad ballast and for road metal. In utility it is the equivalent of crushed rock. Upon both the Radio placer and the adjoining patented claim the deposit has been worked and utilized. It has been found to be desirable and valuable and particularly adapted to the use for which it has been employed. The deposit is limited in area.

The claim was apparently located in entire good faith. The original locators are the applicants for patent. The location and patenting of the Lorna Doone claim may have induced the location of the Radio placer. There is no ulterior motive or hidden purpose back of these applicants. The use made of the tracts is clearly the sole and only use for which they are suited or valuable. Under the circumstances and conditions disclosed the Department is of the opinion

that the deposit of trap rock is demonstrated to be a valuable mineral deposit within the meaning and intent of the general mining laws and as such is subject to appropriation and patent as a placer mining claim.

In the Commissioner's decision a conflict as to lot 1, said Sec. 9, is noted between the placer application and application 033447, filed September 26, 1923, for an oil and gas prospecting permit. The permit application embracing said lot 1 and other tracts was filed by Walter J. Ward three days prior to the placer application which was accompanied by a protest against the former. As the Radio placer claim is held herein to be a valid location made long prior to the presentation of the permit application, the tract in conflict will upon due notice to said Ward, be eliminated from his application.

The appeal herein is sustained. The mineral application, all else being regular, will be allowed to proceed to entry and patent. The decision of the Commissioner is reversed.

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### LETNIK OIL ASSOCIATION v. DAVIS ET AL.

*Decided May 21, 1924.*

#### OIL AND GAS LANDS—PROSPECTING PERMIT—NOTICE—PREFERENCE RIGHT—STATUTES.

The provision in section 13 of the act of February 25, 1920, which gives a preference right to an oil and gas prospecting permit for six months following the marking and posting of notice upon lands in Alaska, is to be construed to mean for six calendar months thereafter, and that the time shall expire at the close of an official day of the local office in the sixth month following posting which corresponds to the date of posting, unless such day does not occur in the sixth month, in which event the last day of that month will mark the expiration of the preference right period.

#### OIL AND GAS LANDS—PROSPECTING PERMIT—APPLICATION—ASSIGNMENT.

While the Department will refuse to approve the assignment of a mere application for an oil and gas prospecting permit, yet it may recognize, in connection with such application, persons who desire to become associated with the permittee in development of the land, and, in such event, will issue a permit to the applicant and his associates, if they be qualified.

#### COURT AND DEPARTMENTAL DECISIONS CITED AND APPLIED.

Cases of Daley v. Anderson (48 Pac., 839), Daly v. Concordia Fire Insurance Company (65 Pac., 416), and United States v. Omdahl (25 L. D., 157), cited and applied.

#### FINNEY, *First Assistant Secretary:*

The Letnik Oil Association, composed of Albert L. Carlton, Harry J. Heuver, Thomas H. Morton, Fred R. Lucas, William E. Sullivan, Alfred Nelson, Helen E. Wentworth, F. J. Stewart, and

H. S. Abbert, has appealed from the decision of the General Land Office dated December 11, 1923, in so far as said decision held the rights of said association to a permit, under section 13 of the leasing act of February 25, 1920 (41 Stat., 437), to prospect for oil and gas upon certain unsurveyed lands in the Anchorage, Alaska, land district, were initiated on September 16, 1920, and were subordinate to rights acquired under similar applications for permits for part of the land filed by James V. Davis, W. L. Keyser, and Edwin Wentworth.

The records disclose that James V. Davis claimed a preference right to a permit by virtue of a notice of intention to make application posted in his behalf on April 22, 1920, by J. J. Finnegan, as attorney in fact. Within six months thereafter, on September 9, 1920, Davis filed application for a prospecting permit. W. L. Keyser posted notice of intention to make permit application on April 22, 1920, and filed his application on or about September 17, 1920. The exact date of filing does not appear, but on the date given the receiver transmitted said application to the General Land Office. His application, which was assigned serial number 04463, was apparently filed shortly after the application under which the Letnik Oil Association claims, which received serial number 04455. Edwin Wentworth posted notice of intention to make permit application on March 16, 1920, and filed his application on July 15, 1920. The hour of posting notice does not appear.

The existence of conflicting claims is not denied by the appellant, and they are shown to exist by the records, although the extent of the conflict of appellant's application with the permits heretofore issued to Davis and Keyser can not be determined pending an adjudication whether these applications were for lands located with reference to true north or to magnetic north. Davis has charged that Keyser and others, in conjunction with whom he located his permit area, have changed the boundary monuments from magnetic north to true north, and has asked for an extension of time to prove his charge. The Commissioner had theretofore held that both Davis and Keyser located the lands with reference to true north.

The appellant association claims priorities, however, because of a notice of intention to make application shown to have been posted upon the land involved on March 16, 1920, hour of posting not shown, by E. Wentworth, agent for Albert L. Carlton. The said Wentworth appears to be one of the appellees herein. On September 16, 1920, there was filed an application for prospecting permit for the land involved. This application was executed by R. E. Robertson as attorney in fact for Albert L. Carlton, but was accompanied by Carlton's own affidavit as to his citizenship. An amendatory application was filed by Carlton on October 12, 1920.

There was, thereafter, filed a partnership agreement creating the Letnik Oil Association, entered into by Carlton and the remaining appellants herein on May 10, 1920. In that agreement, Carlton expressly admits that the notice posted and application filed were for the use and benefit of the association; and amendments to the permit application have been filed by said association disclosing the qualifications of all its members to acquire an interest in said permit, and a proper bond has been filed by it. Upon these facts, the association now claims that its rights were initiated by the posting on March 16, 1920, and a preference secured by the filing made by Robertson on September 16, 1920.

The provision in section 13 of the leasing act which allows a preference right to a permit to persons posting notice upon lands in Alaska "for six months following such marking and posting" is to be construed to mean for six calendar months thereafter, and that the time for filing shall expire at the close of an official day of the local office in the sixth month following posting which corresponds to the date of posting, unless such day does not occur in said sixth month, in which case the last day of said month will mark the expiration of the preference period. *United States v. Omdahl* (25 L. D., 157), *Daly v. Concordia Fire Insurance Co.* (16 Colo. App., 349; 65 Pac., 416), *Daley v. Anderson* (7 Wyo., 1; 48 Pac., 839). Thus it appears that the application filed on September 16, 1920, was within the six months period prescribed in the leasing act.

While the Department will not approve the assignment of a mere application for a prospecting permit, it perceives no reason why it may not recognize, in connection with such application, persons who desire to become associated with the permittee in development of the land, and will issue the permit to the permittee and his associates, if they are qualified. The acquiring of associates neither constitutes speculation nor injures the rights of any conflicting applicants, for the claim of the original applicant is in nowise enlarged nor the time of its inception altered.

If, therefore, the association, or Carlton, can show that the posting by Wentworth, alleged to have been made for the benefit of Carlton, was made pursuant to authority which preceded the posting, and was for Carlton's own benefit, or for his benefit as trustee for the persons who later became his partners, it must be held that the association's rights were initiated on March 16, 1920. If such showing is made, it is clear that appellant will be entitled to priority over Davis and Keyser; and, unless it is shown definitely which notice was first posted by Wentworth in the field on March 16, 1920, said association will be considered as initiating a simultaneous claim with that of Wentworth, which conflict must be adjusted by a division of the area in dispute within 30 days from notice, or by a drawing.

The case is, therefore, remanded, with instructions that the appellant association be allowed 30 days from notice within which to show that notice was properly posted by an agent duly authorized to act either in its behalf or in behalf of Carlton at the time of posting. If such showing is made, the rights of the appellant will be adjudicated as heretofore directed; and, if such showing is not made, the rejection in the Commissioner's decision now under review will be made final, upon final adjudication of the location of the Davis and Keyser claims so as to indicate the extent of the conflicts with their permits.

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### PRACTICE APPLICABLE TO APPEALS FROM THE REJECTION OF APPLICATIONS FOR PROSPECTING PERMITS FOR CONFLICT.

*Instructions, May 21, 1924.*

#### PRACTICE—APPEAL—NOTICE—PROSPECTING PERMIT—ENTRY—APPLICATION—CONTEST.

The rule that, where an appeal is taken from an order of dismissal of an application to contest, service of notice of the appeal upon the entryman is not required, does not apply to appeals from the rejection of applications to make entry or for prospecting permits because of conflict with previously allowed entries or permits; in the latter class of appeals, service of notice upon the entryman or permittee is compulsory.

#### DEPARTMENTAL DECISION CITED AND APPLIED.

Case of Delfino Cordova and James R. Wilson (47 L. D., 608), cited and applied.

#### FINNEY, *First Assistant Secretary*:

The Department has considered your [Commissioner of the General Land Office] letter of the 10th instant, inquiring, in effect, if the rule announced in *Condas v. Heaston* (49 L. D., 374) should be followed in the matter of appeals from the rejection of applications for prospecting permits where the land described is embraced in an outstanding permit, and in appeals from the rejection of applications to make entry where the land applied for is embraced in an entry.

The rule referred to was stated as follows:

An entryman does not become a party to contest proceedings prior to the allowance of a contest and service of notice thereof upon him, and where an appeal is taken from an order of dismissal of an application of contest, service of notice of the appeal upon the entryman is not required.

The rule quoted applies, of course, only to appeals from the rejection or dismissal of applications to contest where the entryman has not been served with notice of the contest. Other appeals from decisions by local officers are governed by the departmental decision in *Delfino Cordova and James R. Wilson* (47 L. D., 608).

## FRED H. SMITH.

*Instructions, May 21, 1924.*

PATENT—RESERVATION—HOMESTEAD ENTRY—OIL AND GAS LANDS—COAL LANDS—ALASKA.

A patent for public lands in Alaska, entered subject to the provisions and reservations of the act of March 8, 1922, should contain a reservation of only that character of mineral for which the land was reported or believed to be valuable.

## DEPARTMENTAL REGULATIONS AMENDED.

Paragraph 3 of regulations of July 31, 1922, Circular No. 842 (49 L. D., 196), amended.

FINNEY, *First Assistant Secretary*:

You [Commissioner of the General Land Office] have informally submitted to the Department the homestead entry of Fred H. Smith (Anchorage 05028), embracing NE.  $\frac{1}{4}$ , Sec. 29, T. 13 N., R. 3 W., S. M., Alaska, under which final cash certificate issued February 11, 1924.

When the application to make the entry was filed there was pending an application for a permit under section 13 of the act of February 25, 1920 (41 Stat., 437), to prospect for oil and gas upon the land. Because thereof, Smith later filed his consent to the amendment of the application to state that it was made in accordance with and subject to the provisions and reservations of the act of March 8, 1922 (42 Stat., 415), as to oil and gas.

The land is not embraced in any withdrawal or reservation; hence you desire instructions as to whether the patent should contain a reservation as to any mineral other than oil and gas.

Paragraph 3 of the regulations of July 31, 1922, Circular No. 842 (49 L. D., 196), under the act of March 8, 1922, *supra*, provides that there will be incorporated in patents issued to homestead claimants under the latter act the following:

Excepting and reserving, however, to the United States all the coal, oil, or gas in the lands so patented, and to it, or persons authorized by it, the right to prospect for, mine, and remove such deposits from the same upon compliance with the conditions and subject to the provisions and limitations of the act of March 8, 1922 (Public, No. 165).

The said act of 1922 applies to public lands in Alaska "known to contain workable coal, oil, or gas deposits, or that may be valuable for the coal, oil, or gas contained therein, and which are not otherwise reserved or withdrawn."

The debates in Congress when the legislation was under discussion leave no doubt that it was intended to provide for the reservation of only the mineral (coal or oil and gas) for which the land was reported or believed to be valuable; and this intention is manifest from the reservation of "coal, oil, *or* gas" [*italics supplied*]"—"or" having been used in its ordinary meaning of marking an alternative.

The form of reservation to be inserted in patents is therefore amended to read as follows:

Excepting and reserving, however, to the United States all the [deposit on account of which the lands are withdrawn, classified, or reported to be valuable—coal or oil and gas, as the case may be] in the lands so patented, and to it, or persons authorized by it, the right to prospect for, mine, and remove such deposits from the same upon compliance with the conditions and subject to the provisions and limitations of the act of March 8, 1922 (42 Stat., 415).

### FRED WALLACE.

*Decided May 21, 1924.*

PREFERENCE RIGHT—PURCHASE—IMPROVEMENTS—CULTIVATION—SURVEY—SECRETARY OF THE INTERIOR—SUPERVISORY AUTHORITY—ARKANSAS—STATUTES.

The provision in section 2 of the act of September 21, 1922, requiring that applications for the exercise of preference rights accorded by the act to persons who had placed valuable improvements upon or reduced to cultivation the lands specified therein, be filed within ninety days from the passage of the act or from the filing of the plat of survey, is merely a limitation upon the exercise of the preference right privilege, and does not restrict the authority of the Secretary of the Interior, conferred by the general provisions of the act, to sell, in his judgment and discretion, the lands, not adversely claimed, to any citizen of the United States.

*FINNEY, First Assistant Secretary:*

Fred Wallace has appealed from a decision of the Commissioner of the General Land Office dated January 25, 1924, rejecting his application to purchase lots 1 and 2, Sec. 24, T. 11 N., R. 7 E., 5th P. M., Arkansas (34.66 acres), under the provisions of the act of September 21, 1922 (42 Stat., 992).

The application was filed September 21, 1923, and was rejected because not filed within 90 days after the plat of survey of the lots was filed in the local office—February 6, 1923.

The local officers, pursuant to the regulations of November 18, 1922, Circular No. 864, (not published), referred the application to the chief of field division for investigation and appraisalment of the land. Under date of December 27, 1923, a special agent reported that the two lots were fenced and were used for pasture by the applicant. Both lots were appraised at \$10 per acre, making the total valuation of the two lots \$346.60.

In a supplemental affidavit executed September 26, 1923, applicant stated that the improvements on the land consisted of a house of no value, two acres cleared prior to September 21, 1922, valued at \$40, and the wire fence, valued at \$50. Further:

Fred Wallace further states that he did not do the improving himself, and that he only acquired the adjoining deeded land in December, 1922, and that the improvements above mentioned were made by Ike Burnett, whose title affiant now owns.

It appears that on March 19, 1923, Ike Burnett applied to make homestead entry for said lots 1 and 2, claiming settlement on the land prior to the withdrawal thereof by Executive order of April 13, 1917. His application was allowed May 12, 1923. On August 31, 1923, Burnett executed a relinquishment of his entry, stating therein that he was mistaken at the time of making application as to what constituted occupancy of the land; that he had not in fact resided upon the land, making it his home, but had stayed there occasionally for a night or two, while his family resided at his permanent home, and that Fred Wallace is the owner of the land adjoining, and has two or three acres of said lots in actual possession with growing crops thereon. The relinquishment was filed in the local office on September 5, 1923, and on September 12, 1923, said Wallace applied to make an adjoining farm homestead entry for said lots 1 and 2, based on the ownership of what is described as the fractional NW.  $\frac{1}{4}$  said Sec. 24 (98.33 acres). The local officers rejected the application, holding that the land had not been restored to homestead entry, and suggesting that Wallace file an application to purchase the lots. The pending application was thereupon filed.

Said lots 1 and 2 have been surveyed as lying between the meander line of so-called Superior Lake as erroneously surveyed in 1840 and the actual shore line of 1840.

By Executive order (No. 2593) of April 13, 1917, the public land in T. 11 N., R. 7 E., 5th P. M., and other townships in Arkansas was withdrawn from settlement, location, sale, or entry, pending preliminary examination and survey—

with a view to ascertaining the practicability of improving the St. Francis River in the States of Arkansas and Missouri, and of incidentally reclaiming by drainage the contiguous lands, pursuant to an act of Congress making an appropriation for that purpose, approved July 27, 1916 (39 Stat., 409), and in contemplation of any further legislation that may be enacted in connection therewith.

The act approved September 21, 1922, *supra*, entitled "An Act Granting to certain claimants the preference right to purchase unappropriated public lands in the State of Arkansas," provides:

That the Secretary of the Interior, in his judgment and discretion, is hereby authorized to sell, in the manner hereinafter provided, any of those public lands situated in the State of Arkansas which were originally erroneously meandered and shown upon the official plats as water-covered areas, and which are not lawfully appropriated by a qualified settler or entryman claiming under the public land laws.

SEC. 2. That any citizen of the United States who in good faith under color of title or claiming as a riparian owner has, prior to this Act, placed valuable improvements upon or reduced to cultivation any of the lands subject to the operation of this Act, shall have a preferred right to file in the office of the register and receiver of the United States land office of the district in which the lands are situated, an application to purchase the lands thus improved by

them at any time within ninety days from the date of the passage of this Act if the lands have been surveyed and plats filed in the United States land office, otherwise within ninety days from the filing of such plats. Every such application must be accompanied with satisfactory proof that the applicant is entitled to such preference right and that the lands which he applies to purchase are not in the legal possession of an adverse claimant.

SEC. 3. That upon the filing of an application to purchase any lands subject to the operation of this Act, together with the required proof, the Secretary of the Interior shall cause the lands described in said application to be appraised, said appraisal to be on the basis of the value of such lands at the date of appraisal, exclusive of any increased value resulting from the development or improvement thereof for agricultural purposes by the applicant or his predecessor in interest, but inclusive of the stumpage value of any timber cut or removed by the applicant or his predecessor in interest.

SEC. 4. That an applicant who applies to purchase lands under the provisions of this Act, in order to be entitled to receive a patent must within thirty days from receipt of notice of appraisal by the Secretary of the Interior pay to the receiver of the United States land office of the district in which the lands are situated the appraised price of the lands, and thereupon a patent shall issue to said applicant for such lands as the Secretary of the Interior shall determine that such applicant is entitled to purchase under this Act. The proceeds derived by the Government from the sale of lands hereunder shall be covered into the United States Treasury and applied as provided by law for the disposal of the proceeds from the sale of public lands.

SEC. 5. That the Secretary of the Interior is hereby authorized to prescribe all necessary rules and regulations for administering the provisions of this Act and determining conflicting claims arising hereunder.

The effect of the act quoted was to modify the withdrawal of April 13, 1917, to the extent of allowing the sale of lands of the character described in the act. Section 2 provides for preferred rights to a certain class of persons, and allows 90 days from the date of the passage of the act, if the plat of survey be on file, or, if unsurveyed, 90 days from the filing of the plat of survey, within which such preference rights must be asserted, but it was not intended by Congress to forbid the sale of a tract to a qualified applicant merely because he had not made application to purchase within a certain time, except in the presence of an adverse right. The act did not limit sales to persons who had placed valuable improvements upon or reduced the lands to cultivation, but merely granted to such persons a preferred right to purchase, and conferred on the Secretary of the Interior authority to sell any of the lands, "in his judgment and discretion," to any citizen of the United States.

The object of the act, as explained during the debate on the floor of the House of Representatives, was to afford relief to the owners of the riparian lands. Wallace belongs to this class, and in the absence of any adverse claim no reason is apparent why his application to purchase should not be allowed. It is so ordered, the decision appealed from being reversed.

## RULES GOVERNING PAYMENTS FOR COAL PRODUCTION PRIOR TO AND AFTER THE ISSUANCE OF PERMITS AND LEASES.<sup>1</sup>

*Instructions, May 23, 1924.*

### COAL LANDS—TRESPASS—PAYMENT—DAMAGES.

Moneys recovered for coal trespasses upon the public lands are covered into the United States Treasury as "Miscellaneous Receipts," irrespective of whether the trespasses occurred before or after the enactment of the leasing act of February 25, 1920, and no exception is made as to recoveries from persons who have been awarded leases under that act.

### COAL LANDS—TRESPASS—LEASE.

Coal operations upon public lands commenced prior to the award of a lease by one who becomes a successful bidder for a lease at public auction constitute a trespass, notwithstanding that the operations were conducted by a potential lessee.

### COAL LANDS—TRESPASS—LEASE—APPLICATION.

The mining of coal before the filing of an application for a coal lease by one equitably entitled thereto because of prior operations constitutes a trespass, but all coal mined after the filing of the application pursuant to which the lease is awarded will be deemed to have been mined under the terms of the lease.

### COAL LANDS—PAYMENT—PAST PRODUCTION—WORDS AND PHRASES.

The term "past production" as used in section 35 of the leasing act has particular reference to cases arising under section 18 of that act, where relief is authorized upon payment to the Government for the minerals produced prior to application for relief, and it has no applicability to coal production.

### DEPARTMENTAL DECISION CITED AND APPLIED.

Case of Big-4 Consolidated Oil Company (49 L. D., 482) cited and applied.

### FINNEY, *First Assistant Secretary*:

I have before me your [Director of the Bureau of Mines] request for instruction, dated April 22, 1924, in the matter of reports furnished by your bureau to the Commissioner of the General Land Office of coal production upon lands under coal prospecting permits and leases issued pursuant to section 2 of the leasing act of February 25, 1920 (41 Stat., 437), and note your inquiries therein.

Before proceeding to state the views of the Department in each of the five cases stated in your letter, I shall briefly indicate the situation with respect to coal mined upon the public domain prior to and after permits or leases are issued.

It is obvious that coal mined upon the public domain without any right under the public land laws is mined in trespass, and such sums as are received by the Government for coal so mined are covered into the Treasury of the United States as "Miscellaneous Receipts." Such is the case whether the trespass occurred before or after the

<sup>1</sup>Promulgated July 19, 1924, as Circular No. 953 (unpublished).—Ed.

passage of the leasing act of February 25, 1920, *supra*, and whether the sum was recovered by adverse proceedings or voluntarily paid by persons who have been awarded leases under the act of February 25, 1920.

Where a party has applied to have lands offered for lease at public auction and becomes the successful bidder when such auction is held, any operations commenced before such lease is awarded constitute a trespass, and the funds received in payment for coal removed while such trespass existed occupy the same status as though the trespasser was not, at the time of payment, a potential lessee.

Where, however, a lessee makes application for a lease, and shows that he has in good faith improved, occupied, or claimed coal lands, and is found equitably entitled to a lease, coal produced prior to the application for a lease was produced in trespass and will be collected for as such; but, if the lessee has at all times been in possession of the land, working the same, all coal produced after application is made for a lease will be considered as mined under the lease, and the lessee will be held accountable therefor, and for the prescribed rentals, from that time, under the principles stated in the case of the Big-4 Consolidated Oil Company (49 L. D., 482).

Prospecting permits are granted only where such operations are necessary to show the existence and workability of coal deposits, and in such case there can be no past production. Provision is made in these permits for the payment of a royalty on all coal produced thereunder before lease is applied for. Such royalties are to be regarded as under the leasing act, rather than past production as that term is used in section 35 of the leasing act. In this case also, rentals and royalties under the lease will commence upon the date when lease is applied for.

From the foregoing it is clear that the term "past production" used in section 35 of the leasing act refers only to those cases such as in section 18 of the act, where relief is authorized to be granted upon the payment to the Government for the minerals produced prior to application for relief, and does not refer to trespass cases in which provision is not expressly made in the act for payment for past production. No provisions of this character have been made in the act with respect to coal deposits.

With these general propositions in mind consideration will now be given the cases stated in your letter.

Case 1. Where coal has been mined in trespass prior to the act of February 25, 1920, should this production be itemized separately from that mined after February 25, 1920, on account of the division provided for in section 35 of the act of February 25 1920, relating to "Past Production"?

Reports of production mined in trespass should in all cases be itemized separately from production under permits and leases.

Case 2. Is the division provided for in section 35 of the act effective for coal mined after February 25, 1920, and prior to the date on which the application for lease or permit is made?

The division referred to in section 35 of the leasing act has no application to coal production.

Case 3. Assuming that the royalties or moneys received for settlement for coal mined, in cases 1 and 2, are deposited in the United States Treasury as miscellaneous receipts; is the division provided for in section 35 applicable to moneys received for coal or mineral after application is made for lease but prior to its being awarded at public auction?

If a lessee mines coal before being awarded a lease at public auction, the production is in trespass and is to be separately accounted for as such. In this situation no rights are initiated by applying to have the lands offered for lease, as the applicant must be the highest bidder in order to succeed.

Case 4. If the division of moneys provided for in section 35 does not apply to the above, does that division apply after the sale and awarding of a lease by auction and prior to the date the lease is finally issued?

Upon the awarding of the lease at the auction the successful bidder in possession is accountable for the coal deposits and for rentals as though the lease had issued. See the case of the Big-4 Consolidated Oil Company, *supra*.

Case 5. In many cases where a lease results from a prospecting permit, several months lapse between the date that the permit has expired and the date the lease is issued. Should this production be itemized separately from the production under the permit and lease so that the moneys received as royalties can be deposited in the United States Treasury as miscellaneous receipts?

Where a permittee has discovered coal and has applied for a lease, such application supersedes the permit, and when lease is granted it relates back to the time of application. There can be no interval, for the permittee must account for the coal in accordance with the terms of his permit until lease is applied for, and thereafter in accordance with the terms of the lease. Your reports need, therefore, to make distinctions only between coal mined under the permit and after the application for lease has been filed.

#### PHOSPHATE REGULATIONS—PARAGRAPHS 4 AND 5, CIRCULAR NO. 696, AMENDED.

[Circular No. 936.]

DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE,  
Washington, D. C., May 23, 1924.

REGISTERS AND RECEIVERS,  
UNITED STATES LAND OFFICES:

In departmental decision of May 3, 1924, in the case of Reginald C. Willis (50 L. D., 427), paragraphs 4 and 5 of the regulations con-

cerning phosphate leases and use permits, under the act of February 25, 1920 (41 Stat., 437), contained in Circular No. 696 (47 L. D., 513), were amended to read as follows:

4. *Minimum development.* (a) An actual *bona fide* expenditure for mine operations, development, or improvement purposes of the amount determined by the Secretary of the Interior will be a condition in each lease as the minimum basis on which each lease will be granted, with the requirement that not less than one-third of such proposed investment shall be expended in development of the mine during the first year, and a like amount each year for the two succeeding years, the investment during any one year over such proportionate amount for that year to be credited on the expenditure required for the ensuing year or years.

(b) Where, however, the lands involved are in an unproven territory, the portion of the total minimum investment required to be made during the first few years of the lease will be fixed in such amounts as the circumstances in each case require.

(c) A bond in the sum of \$5,000, executed by the lessee with approved corporate surety and conditioned upon the making of the minimum investment required and upon compliance with the terms of the lease, will be required.

Sec. 5 of the regulations is amended by the addition of the following:

But in a case where the lands are in an unproven territory, the minimum production requirement may be made to begin at such time and to run for such periods as the Secretary may find warranted.

WILLIAM SPRY,  
*Commissioner.*

Approved:

E. C. FINNEY,

*First Assistant Secretary.*

### HIRAM M. HAMILTON, INLAND LUMBER AND TIMBER COMPANY, TRANSFEEE (ON REHEARING).

*See 33 L. D. 468*

*Decided May 26, 1924.*

#### FOREST LIEU SELECTION—RELINQUISHMENT—PURCHASER.

The selection of land in lieu of a relinquished claim in a forest reserve under the act of June 4, 1897, can be exercised only by or in behalf of the owner of the land relinquished, and any defect of title in the purported owner of the base land is properly subject to objection as against the selector and equally against anyone claiming under the selector, except where title to the selected tract has passed from the Government and is held by a *bona fide* purchaser.

#### FOREST LIEU SELECTION—FRAUD—PURCHASER.

The proviso to the act of March 3, 1905, which provides that if for any reason not the fault of the party making the selection a pending forest lieu selection is held invalid, another selection may be made in lieu thereof, does not authorize a purchaser of the unpatented selected tract, without notice of fraud, to make a new selection, if the base land had been fraudulently acquired and the selection properly rejected.

#### COURT AND DEPARTMENTAL DECISIONS CITED AND DISTINGUISHED.

Cases of *United States v. Hyde* (174 Fed., 175) and *Thomas B. Walker* (39 L. D., 64, 426) cited and distinguished.

FINNEY, *First Assistant Secretary*:

By decision of April 2, 1924, the Department on appeal affirmed the action of the General Land Office rejecting the application of the Inland Lumber and Timber Company as transferee of Hiram M. Hamilton to make forest-lieu selection under the provisions of the acts of June 4, 1897 (30 Stat., 11, 36), and March 3, 1905 (33 Stat., 1264), for the SE.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ , Sec. 31, T. 34 N., R. 79 W., 6th P. M. Douglas, Wyoming, land district, in lieu of the NW.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , Sec. 36, T. 7 S., R. 22 E., M. D. M., California.

The ground relied upon for rejection of the proffered selection was that the base land offered was refused in connection with a former selection based thereon because it had been fraudulently acquired from the State of California by Hamilton, and that Hamilton's claim of title was subject to attack by the State; that the act of March 3, 1905, allowing right of new selection under certain conditions did not apply in this case because of the provision permitting another selection only where the prior selection was rejected for any reason not the fault of the party making the same.

A motion for rehearing has been filed by the Inland Lumber and Timber Company alleging error in holding that Hamilton was the prior selector and in not holding that the Inland Lumber and Timber Company was the real selector as a *bona fide* purchaser of the selection right and free from fault in respect to the fraud committed in acquiring the base land from the State. These are not new contentions. They were fully considered and disposed of in the former decision.

Support for the motion is sought in certain decisions referred to in the brief. The case of *United States v. Hyde* (174 Fed., 175) is quoted from at length in an endeavor to show that the Inland Lumber and Timber Company by purchase of the right of selection from Hamilton without notice of fraud acquired an indefeasible right free from the charge of fraud, and that the right of the said company is not merely coextensive with that of Hamilton but is superior to Hamilton's right, being free from the defect in Hamilton's title. That case is unlike the present one. A patent had issued on the selection in that case and the Government brought suit to cancel the patent because of invalidity of the selector's title to the base land. The fact that the purchase of the selected land was made prior to issuance of patent thereon was held to make no difference in the title of the purchaser; that the purchase of the selected land prior to patent was not void and that when patent issued the title inured to the *bona fide* purchaser. But the court did not hold, and there was no occasion for holding, that this Department is obliged to recognize a purchaser of a so-called selection right and accord him

the right to make a selection or to hold the land selected free from defect of title that existed in respect to the owner of the base land. The court merely held that upon approval of the selection and issuance of patent the prior *bona fide* purchaser could defend his title against fraud committed by the selector.

This Department has always held that the act of June 4, 1897, authorized selection only by or in behalf of the owner of the land relinquished, and so far as known no court has held to the contrary. Any defect in the title of the purported owner of the base land is properly subject to objection as against the selector and equally against anyone claiming under the selector except where title to the selected tract has passed from the Government and is held by a *bona fide* purchaser.

Reference was also made to the case of Thomas B. Walker (39 L. D., 64, 426). That case manifestly has no direct application to the facts of this case. The question there involved was whether the selector had a good title to the base land as a *bona fide* purchaser from persons who acquired same from the State fraudulently. In the present case it was clearly established prior to rejection of the original selection that the selector was guilty of fraud in acquiring the base land from the State, and the right of selection was denied for that reason.

The former decision is adhered to and the motion is accordingly denied.

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## RULE GOVERNING THE APPLICATION OF THE PROVISIO TO SECTION 7, ACT OF MARCH 3, 1891, WITH RESPECT TO RECLAMATION HOMESTEAD ENTRIES.

*Instructions, May 26, 1924.*

### RECLAMATION HOMESTEAD—FEES—CONFIRMATION—STATUTES.

Receipt for the payment of the final commissions at the date of the submission of proof of compliance with the ordinary provisions of the homestead law in connection with a reclamation homestead entry does not start the running of the confirmatory period in the proviso to section 7 of the act of March 3, 1891.

### RECLAMATION HOMESTEAD—CONFIRMATION—FINAL PROOF—FEES—WATER RIGHT—STATUTES.

The commencement of the running of the the confirmatory period in the proviso to section 7 of the act of March 3, 1891, in connection with a reclamation homestead entry, is the date on which receipt issues for payment of the required final commissions, after the entryman has conformed his entry to a farm unit, shown reclamation of one-half of the irrigable area in such unit, assumed payment for a water right, made payment of all accrued water-right charges, and submitted proof of these facts.

FINNEY, *First Assistant Secretary*:

The Department has considered your [Commissioner of the General Land Office] letter of April 29 last, requesting instructions as to whether the proviso to section 7 of the act of March 3, 1891 (26 Stat., 1095), is applicable to cases in which final commissions were paid at the date of proof of compliance with the ordinary requirements of the homestead law on entries made subject to the reclamation act of June 17, 1902 (32 Stat., 388).

The purpose of the said proviso was to relieve a congestion of suspended entries in the General Land Office, and to avoid such congestion in the future. It was intended to operate upon all the cases of the classes named therein wherein the entryman had done all the formal acts to and including the submission of final proof and final payments, regardless of the sufficiency of such proof, provided no action adverse to the proof—protest or contest—was initiated within two years from the date of the receiver's final receipt. It put the entryman in the position of one who had earned patent, and in addition made the issuance of patent mandatory. The confirmatory period begins to run from the date "of the issuance of the receiver's receipt upon the final entry of any tract of land under the homestead \* \* \* laws."

In its decision in the case of *Thomas J. Stockley et al. v. United States* (260 U. S., 532), the Supreme Court of the United States quoted with approval the instructions of June 4, 1914 (43 L. D., 322), wherein it was said (page 323):

There is no doubt that Congress chose the date of the receiver's receipt rather than of the certificate of the register as controlling, for the reason that payment by the claimant marks the end of compliance by him with the requirements of law.

In the case of a homestead entry which is made subject to the provisions of the reclamation act, the confirmatory period, if the act of 1891 applies at all, can not begin to run upon submission of proof of compliance with the general requirements of the homestead law, for the following reasons:

First. Such a proof does not, under the law, entitle the entryman to a patent, even if the proof is in all respects satisfactory.

Second. In practice no receiver's final receipt issues at the time of the submission of such proof, and in law no final receipt could issue at that time, for, in the language of the Supreme Court and the Department, as heretofore indicated, the perfection of such proof by payment of the final commissions would not mark "the end of compliance by him with the requirements of law."

Of course the Land Department can not avoid the effect of the act of 1891 by a mere change of practice in the matter of issuing re-

ceipts or requiring payments; but the reclamation law has created a condition whereby a point in the perfection of the entry such as was contemplated by the act of 1891 can not readily arise. As the Supreme Court said, the proviso to-day means nothing more nor less than it did when it was enacted, but the reclamation law has eliminated, as a fixed point, that conjunction of events which marked the beginning of the period of confirmation contemplated by the proviso.

In other words, the proof of compliance with the ordinary provisions of the homestead law does not complete the entry nor confer a right to a patent. There must be reclamation of the land and payments made on a water right. If the claimant conforms his entry to a farm unit, shows reclamation of one-half the irrigable area in such unit, assumes the payment for a water right, pays all the water-right charges which have accrued, makes proof of these facts, and pays the required final commissions, for which receipt issues, he becomes entitled to a patent which reserves a lien on the land for all sums due the Government; and the act of 1891 then begins to operate.

You are therefore instructed that the receipt for the payment of the final commissions at the date of the submission of proof of compliance with the ordinary provisions of the homestead law in connection with a reclamation entry does not start the running of the confirmatory period provided for by the act of 1891.

With your letter you forwarded two cases—Miles City 01556 and Waterville 03999.

In the Miles City case, the entry was made May 31, 1905, and was conformed to a farm unit on January 22, 1914. Proof of compliance with the ordinary requirements of the homestead law was submitted July 11, 1910, and was accepted as satisfactory by your office on April 21, 1911. On June 7, 1920, the required proof of reclamation was furnished, but in the meantime a portion of the land had been included in Lower Yellowstone Irrigation District No. 1, and final certificate did not issue until May 29, 1923. The land was withdrawn as valuable for coal on April 20, 1910, and is now classified at \$20 per acre. Entryman has not elected to accept a patent containing the provisions and reservations of the act of March 3, 1909 (35 Stat., 844), nor has he been required to file such an election. Upon the completion of satisfactory proof of reclamation, the receipt for the final commissions issued on July 15, 1910, became on June 7, 1920, a "receiver's receipt upon the final entry," and under the proviso to the act of 1891 it is now too late to issue any requirements under the coal land classification.

In the case of Waterville 03999, the entry was made for a farm unit on October 27, 1906, and satisfactory proof of compliance with the ordinary provisions of the homestead law was submitted October 28, 1911. On May 15, 1913, the project manager filed in the local office a final reclamation affidavit by entryman, and a report to the effect that 34 acres of the unit are irrigable; that practically all the land has been cleared and cultivated, but there is no evidence of the growing of a crop; that 10.8 acres were planted to orchard but only 6.7 acres of the trees are alive, and ditches had been constructed for the irrigation of only 6.7 acres. There were no water right charges delinquent against the land, but the project manager recommended that patent be withheld until further showing has been made as to reclamation and cultivation. The final commissions (\$1.50) were forwarded through the project manager, and on May 15, 1913, the receiver issued his receipt therefor. You have taken no action in the matter, and the entryman has made no further showing. The confirmatory period began to run on May 15, 1913, and it is now too late to require any further showing.

#### RECORDS—NOTATION OF CANCELLATION OF OIL AND GAS PERMITS—CIRCULAR NO. 929, AMENDED.

[Circular No. 939.]

DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE,  
*Washington, D. C., May 28, 1924.*

#### REGISTERS AND RECEIVERS, UNITED STATES LAND OFFICES:

The second paragraph of Circular No. 929, approved April 23, 1924 (50 L. D., 387), relating to filing oil and gas applications for lands embraced in a canceled permit, is hereby amended by adding thereto the following:

However, where application is filed by the former permittee such application must be accompanied by an agreement to furnish bond in the sum of \$1,000, conditioned as security that drilling operations will be commenced within six months from the date of issuance of said permit and for compliance with the remaining drilling requirements of such permit. This bond is to be in addition to the bond required by the regulations in other cases. In case the former permittee is successful at the drawing, his application and that of the party next in order in the drawing will be suspended for 15 days, within which time the bond herein required must be furnished by the successful applicant. In case he fails to furnish said additional bond within this period, his application will be rejected and that of the remaining applicant forwarded for consideration in due course.

Where it appears that the former permittee has associated himself with others who are successful in the drawing, or is a stockholder in a corporation which acquires priorities at the drawing, such fact will not require the suspension of said application nor the furnishing of a bond as above required,

although such requirement may be made by this office where it appears that the control of the permit will be in the hands of the former permittee.

WILLIAM SPRY,  
*Commissioner.*

Approved:  
E. C. FINNEY,  
*First Assistant Secretary.*

### BRANCH v. BRITTAN ET AL.

*Decided May 31, 1924.*

#### OIL AND GAS LANDS—PROSPECTING PERMIT—ASSIGNMENT.

The assignment of an oil and gas prospecting permit does not create separate and distinct obligations to the United States, but the assignee merely secures as to the land assigned the same right to prospect thereon which the permittee had, and drilling by either the permittee or the assignee is development for the entire permit.

#### OIL AND GAS LANDS—PROSPECTING PERMIT—STOCK-RAISING HOMESTEAD—IMPROVEMENTS—DAMAGES—LAND DEPARTMENT—COURTS—JURISDICTION.

The enforcement of the provision in section 9 of the act of December 29, 1916, which obligates one who goes upon lands within a stock-raising homestead entry to prospect for mineral to reimburse the entryman for injury to his permanent improvements, is for the courts and not within the jurisdiction of the Land Department.

#### OIL AND GAS LANDS—PROSPECTING PERMIT—LEASE—STOCK-RAISING HOMESTEAD—IMPROVEMENTS—SURFACE RIGHTS—DAMAGES—BOND—STATUTES.

The requirement in the act of December 29, 1916, that a bond be furnished as security of compensation for damage to the permanent improvements of a stock-raising homestead entryman is applicable only to persons acquiring rights to mine and remove the mineral deposits, but not, as does the act of July 17, 1914, to one who has been granted merely a prospecting permit.

FINNEY, *First Assistant Secretary:*

Robert I. Branch has appealed from the decision of the Commissioner of the General Land Office, dated November 10, 1923, affirming the dismissal by the register and receiver of the Los Angeles, California, land office, of his application to contest a prospecting permit issued on July 28, 1921, to Edward F. Brittan, pursuant to section 13 of the leasing act of February 25, 1920 (41 Stat., 437), for the W.  $\frac{1}{2}$  NE:  $\frac{1}{4}$ , NW.  $\frac{1}{4}$ , N.  $\frac{1}{2}$  SW.  $\frac{1}{4}$ , Sec. 34, T. 11 N., R. 20 W., S. B. M., which was assigned, as to the N.  $\frac{1}{2}$  NW.  $\frac{1}{4}$ , Sec. 34, to William G. McAdoo, jr., and Robert J. Gilbert, said assignment being approved on May 3, 1923.

Branch made entry for the land involved on January 26, 1920, under the stock-raising act of December 29, 1916 (39 Stat., 862),

and was issued patent thereon on October 21, 1921, with the usual reservations of minerals prescribed in said act.

When the assignment of the permit as to part of the land was filed, the local officers erroneously filed it under a new serial number as a separate record numbered 036313; and, on August 2, 1923, Branch filed, in the local office, an application to contest the permit and the assignment, alleging in substance: First, that he is the owner in fee of all rights in said land, and entitled to the sole and exclusive possession thereof; second, that the Department and the Congress are without authority of law, after issuance of patent to appellant, to permit, either by law or regulation, any prospecting operations upon the land, and the entry of said lands by the assignees is a trespass, resulting in damage to his fences and grass and herbage upon the land; third, that the Government is without authority to divide lands into several estates, as it only holds title to the public lands in trust for the citizens of the United States, who may secure patents to said lands by complying with the regulations governing the segregation of such lands; fourth, that the permit was obtained purely for speculative purposes.

On August 2, 1923, the local officers rejected this contest application, because no sufficient grounds therefor were stated, and held that the appellant had no right, title, or interest in the minerals in the lands involved which gave him a right to be heard.

Branch reiterated his charges in his appeal to the Commissioner from the ruling of the local officers, with the added claim that the permittee and the assignees should have been required to furnish security for compensation to him for damage to his crops and improvements.

In the decision now appealed from, the Commissioner pointed out that the stock-raising act only authorized the entry of the surface of mineral lands; and that while a permittee was obligated under said act to compensate entrymen for damage to crops and improvements, the enforcement of such compensation, where no agreement could be reached, was a matter for the local courts.

In this appeal the original grounds of complaint are departed from to a certain extent, the appellant now emphasizing that Brittan has done no drilling upon the land covered by said permit after the assignment of the N.  $\frac{1}{2}$  NW.  $\frac{1}{4}$ , Sec. 34, to McAdoo and Gilbert, and that the latter should be held liable, under the bond furnished by them in connection with their assignment, for damages claimed to have been done to fences and crops, the amount of which must be determined at a hearing before the local officers.

The Department will consider the correctness of all of the actions heretofore taken in the case, although certain objections seem to have been abandoned by the appellant.

His claim that the United States has no authority of power to divide the estates in public land, severing the surface estate from the estate in the minerals, is not well founded; as the Congress of the United States is, by the Constitution, given a broad general power to dispose of the public lands of the United States, and thereunder may, and has, since the beginning of public land laws, created estates in public lands, with whatever restrictions, limitations, and reservations it has deemed necessary for the public welfare.

In the act of December 29, 1916, *supra*, under which this appellant acquired title to the land involved, the Congress, in the exercise of the power above described, provided that *all* entries made and patents issued for lands designated as subject to the provisions of said act should be "subject to and contain a reservation to the United States of all the coal and other minerals in the lands so entered and patented, together with the right to *prospect for*, mine, and remove the same." [Italics supplied.] By the leasing act of February 25, 1920, *supra*, the Congress provided that permits to prospect for coal, oil and gas, and other named minerals might be issued for such deposits and for "lands containing such deposits owned by the United States." No reasonable doubt can, therefore, be entertained either as to the authority of law for the reservation of minerals, or that, under existing laws, the permit granted to Brittan was properly issued, although appellant was and is the owner of surface rights in the land involved.

The only proper cause alleged in appellant's first application to contest was that the permittee had failed to comply with the law. No affidavits or showings in support of this charge were then presented, and the rejection of the application to contest was correct and was properly affirmed by the Commissioner.

Coming now to the allegations in the present appeal, it is apparent that appellant has been misled, by the erroneous action of the local officers in making a new record of the assignment, into believing that, upon the assignment of the permit as to part of the land, there then arose two separate and distinct obligations to the United States. Such is not the case, for the assignee merely secures as to the land assigned the same right to prospect thereon which the permittee had. The leasing act and the regulations require the drilling of only one well to a specified depth upon lands covered by a permit; and, in the event of discovery of oil or gas, a lease, at a royalty of 5 per cent, is given for one-fourth of the area covered by the permit as originally issued, as a reward for such discovery. The matter of drilling and the selection of the "discovery lease" area are matters to be decided by the permittee and the assignee. It is not until leases are issued that separate obligations

are acquired by the permittee and assignee. Maurice M. Armstrong (49 L. D., 445).

In this case, the permittee assigned his interest in the N.  $\frac{1}{2}$  NW.  $\frac{1}{4}$ , Sec. 34, to McAdoo and Gilbert, in consideration of their agreement to drill for oil upon the tracts described in the assignment. It appears that extensive operations have been carried on by the assignees, which exceed the drilling requirements of the permit as it has been extended pursuant to the act of January 11, 1922 (42 Stat., 356); and appellant's application to contest the permit held by Brittan for that reason must be denied.

There remains appellant's claim to a right to compensation for alleged damages to his fences and the use of his land for grazing purposes. In answer thereto, the assignees have denied that such damage was done.

Before considering the issue thus raised, it is necessary to determine whether the appellant has a right to damages for the injuries alleged; and whether, if he has such right, the Department has jurisdiction to enforce it.

The Congress having the right to prescribe the conditions upon which entries may be made of public lands, it becomes necessary to discover whether a right to compensation has been conferred upon this appellant under any of the public land laws; for, unless this right has been expressly given, it does not exist, as there is nothing in the situation presented which vests appellant with any inherent rights which require compensation if infringed. He made his entry upon the exact terms prescribed by the stock-raising act, and his rights are only coextensive with its provisions.

In section 9 of the stock raising act the following provision appears:

Any person qualified to locate and enter the coal or other mineral deposits, or having the right to mine and remove the same under the laws of the United States, shall have the right at all times to enter upon the lands entered or patented, as provided by this Act, for the purpose of *prospecting* for coal or other mineral therein, provided he shall not injure, damage, or destroy the permanent improvements of the entryman or patentee, and shall be liable to and shall compensate the entryman or patentee for all damages to the crops on such lands by reason of such prospecting. [*Italics supplied.*]

Appellant claims that the Department should, upon his establishing the amount of the damage, collect said damage under the bond furnished by the assignees.

The bond furnished by these assignees is in the sum of one thousand dollars and is, by its terms, given as security for damage to the oil strata through improper methods of operation. The Department does not require bonds in a larger sum for the protection of improvements of surface entrymen, except where said entries are made with

a mineral reservation, pursuant to the act of July 17, 1914 (38 Stat., 509), which act requires such a bond, in expressed terms. It is significant that the act of December 29, 1916, *supra*, makes a similar requirement of a bond in the case where the mineral deposits, or the right to mine and remove them, have been acquired from the United States, as distinguished from the above-quoted provision with respect to prospecting. The said act provides, as to said bond, that it shall be as security for—

the payment of such damages to the crops or tangible improvements of the entryman or owner, as may be determined and fixed in an action brought upon the bond or undertaking in a court of competent jurisdiction against the principal and sureties thereon.

No provision is expressly made for the enforcement of the liability created for prospectors, and it becomes necessary to consider what was the apparent purpose of said provision. The distinction between the two classes of operations above shown, i. e., prospecting, for which no bond is required, and mining and removing, which requires a bond, is evidently that the former is a mere matter of possession for a specific purpose, an easement, whereas the latter is a situation in which certain rights and interests in the land are acquired, even as against the United States, and is of the permanent character of an entry.

Prior to the passage of the leasing act of February 25, 1920, *supra*, minerals could be prospected for and mined and removed pursuant to the general mining laws. During the prospecting stages of mining operations under said laws the prospector acquired only a possessory right so long as he remained in possession and in diligent prosecution of prospecting operations, which right was absolute as against everyone save the United States. The homestead laws authorized agricultural entries of nonmineral lands only; but mineral prospecting could only be carried on upon lands covered by an unperfected nonmineral entry if peaceable entry could be made by the mineral locator. Entries by force were trespasses, which could only be redressed in the local courts.

In the stock raising act the Congress clearly intended to alter this situation, and had especially in mind the provisions of the mining laws in force at the time of passage of said act. This intent is shown by the expressions in the above-quoted portion of section 9 of said act making it relate to persons qualified to *locate* and enter, as the method of asserting claim to most of the mineral lands was by "location." In limiting the rights acquired under the stock raising act so as to reserve the minerals in lands subject to disposal thereunder, and in reserving a right of location and entry for prospecting purposes, the Congress properly qualified this right by conferring upon the entryman a right to compensation for damage to

his permanent improvements. Without such expressed right, entrymen under the stock raising act would have had no redress; for they could only make entry upon the conditions prescribed by the Congress, and, in view of the rights reserved to prospect for, mine, and remove the minerals, would have had no property right the invasion of which could give them a legal cause of action, so long as such injury as was inflicted was necessary to *bona fide* prospecting or mining operations.

In conferring upon the surface entrymen rights to compensation, causes of action were merely conferred. The jurisdiction in which the relief was to be enforced was not changed. That such was the case becomes apparent when it is considered that, as above shown, a mineral locator acquired no rights against the United States during the period of his prospecting operations, and had no application or entry of record, and there could, therefore, be no penalties exacted by the Land Department so as to enforce compensation of the entryman.

It only remains to be determined whether the leasing act of February 25, 1920, *supra*, pursuant to which a prospector for oil or gas must secure a license or permit from the Government, which permit might be rejected as penalty for failure to compensate entrymen, changed this situation, and transferred jurisdiction, to afford relief, as claimed by this appellant, to the Land Department.

The provisions of the stock-raising act with respect to prospecting operations are expressly extended to permittees under the leasing act by section 34 of said act, which reads:

That the provisions of this act shall also apply to all deposits of coal, phosphate, sodium, oil, oil shale, or gas in the lands of the United States, which lands may have been or may be disposed of under laws reserving to the United States such deposits, with the right to prospect for, mine, and remove the same, *subject to such conditions as are or may hereafter be provided by such laws reserving such deposits.* [Italics supplied.]

Thus it will be seen that there was no expressed transfer of jurisdiction, or amendment of the stock-raising act so as to restrict the entryman's remedy to the inadequate relief which could be afforded by the Department, namely, that the payment of damages be required on penalty of cancellation of the prospecting permit. Such a change would be such a radical reduction of the entryman's previous rights as would require expressed words of modification of the stock-raising act.

As the only full and adequate relief which an entryman under the stock-raising act may obtain for damages caused by a mineral prospector must be afforded by the court, the Department would not be warranted, assuming that it had the authority, in attempting to ascertain the measure of damages sustained by an entryman and

to enforce payment by holding the permit for cancellation for a condition broken. If the permittee suffered the cancellation of the permit, the Department's power to relieve would be at an end, its efforts wasted, and the permittee and entryman in precisely the position which they occupied before the Department took jurisdiction, unless, perhaps, the entryman's claim and been barred from the courts, in the meantime, by some statute of limitations.

For the reasons stated, the Department finds no error in the Commissioner's conclusion that the appellant must present his claim to a right to damages to the courts.

Serial number 036313 will be dropped, and all papers assembled under serial 033881, which is the original file number.

The Commissioner's decision is affirmed, and the case is closed.

### GEORGE G. FRANSEN.

*Decided May 31, 1924.*

#### COAL LANDS—WITHDRAWAL—SCHOOL LAND—UTAH—WORDS AND PHRASES.

✓ A temporary withdrawal made with the view to classification and appraisal of land for its coal contents does not constitute a "reservation" within the meaning of the proviso to section 6 of the enabling act of July 16, 1894, relating to the grant of public lands to the State of Utah for school purposes.

#### COAL LANDS—WITHDRAWAL—EVIDENCE—UTAH.

A temporary withdrawal made prior to classification or reservation merely for withholding the land from disposition under the public land laws until further investigation can be made and a decision rendered as to the character of the land does not raise the presumption that the land is mineral nor does it dedicate it to any special purpose.

#### SCHOOL LAND—VESTED RIGHTS—WITHDRAWAL—COAL LAND—EVIDENCE—UTAH.

When the final act is performed which, under the law, would permit a school grant to attach, and there has been no reservation or classification of the land as mineral, the presumption arises that it became the property of the State under its grant.

#### SCHOOL LAND—COAL LANDS—SURVEY—VESTED RIGHTS—EVIDENCE—BURDEN OF PROOF—UTAH.

The fact that at the date of the approval of the survey land within a designated school section was known to be coal in character does not, of itself, destroy the presumption that the land passed to the State under its school land grant, and, to overcome that presumption, the Government must assume and sustain the burden of proof.

#### COURT AND DEPARTMENTAL DECISIONS CITED, APPLIED AND DISTINGUISHED.

Cases of United States *v. Morrison* (240 U. S., 192) and State of Utah, Pleasant Valley Coal Company, Intervener, *v. Braffet* (49 L. D., 212), cited and applied; cases of Albert E. Dorff (50 L. D., 219), and State of Utah *v. Lichliter* (50 L. D., 231), cited and distinguished.

FINNEY, *First Assistant Secretary*:

On February 23, 1918, George G. Frandsen filed, under the provisions of section 2347, Revised Statutes, a coal application to purchase the SE.  $\frac{1}{4}$ , Sec. 2, T. 16 S., R. 14 E., S. L. M., Salt Lake City, Utah, land district. The State of Utah filed a protest against this application on August 13, 1918, claiming that the land inured to it under the grant in aid of its common schools made to it in the enabling act of July 16, 1894 (28 Stat., 107). Hearing on this protest was deferred, by stipulation, pending final decision by the Department in the case of the State of Utah *v.* Mark P. Braffet.

On July 31, 1922, a decision was rendered in that case. State of Utah, Pleasant Valley Coal Company, Intervener *v.* Braffet (49 L. D., 212). In that case the Department held that Braffet, an applicant to purchase coal lands under section 2347, Revised Statutes, whose application, like this appellant's, was for one of the sections designated as a school section, and whose application was protested by the State, was a mere contestant of the State's claim and took nothing by his application, even though it was shown that the State's claim did not attach because of the known coal character of the land at the time of identification of the land by acceptance of the survey.

By decision dated November 28, 1922, the Commissioner of the General Land Office cited the Department's decision in the Braffet case, and held Frandsen's application for rejection, as a mere application to contest the State's title, but without prejudice to his right, if he so desired, to continue the contest, and without any guaranties of preference under the leasing act of February 25, 1920 (41 Stat., 437), which had intervened and superseded the statute under which his application to purchase was filed. Frandsen has appealed from this decision, alleging that the Commissioner erred in holding that his application to purchase was invalid and that the passage of the leasing act, *supra*, precluded sale of the lands under the coal land laws. On March 15, 1924, the local officers reported that a hearing was held in this case in connection with other claims. It does not appear whether any decision has as yet been rendered by the local officers on this hearing, or whether the contest was further prosecuted by Frandsen or by the United States, who intervened.

The ruling in the Braffet case, *supra*, that applications to purchase lands in identified school sections were mere applications to contest the State's claims, was based upon the proposition that unless, at the time of the grant or the subsequent acceptance of a plat of survey which identified a school section, said lands were claimed, withdrawn, or classified as coal, said lands were thereafter, *prima facie*, the property of the State. In such case the burden of proving that the lands did not pass because mineral in character was upon the

✓ United States or any person or corporation initiating a contest against said title. Where, however, prior to the time when the State's rights would attach, if at all, the lands have been claimed, withdrawn, or classified as mineral, the lands are, *prima facie*, public lands of the United States, and valid applications therefor can be initiated under the public land laws. State of Utah *v.* Edward Lichliter *et al.* (50 L. D., 231), and Albert E. Dorff (50 L. D., 219).

It therefore becomes necessary to determine the status of this land at the time that the State's rights would have attached, if at all.

✓ Although the land was surveyed and the township plat was approved by the surveyor general for the State of Utah on July 20, 1905, this survey was suspended on July 11, 1906, and after correction in the field was accepted on June 8, 1909. The State's right attached, if at all, upon the acceptance of the plat of survey. United States *v.* Morrison (240 U. S., 192).

The results of a geological examination made in 1905 by the Geological Survey, published in Geological Survey Bulletin No. 285, show that said SE.  $\frac{1}{4}$ , Sec. 2, is in the Book Cliffs coal field and lies south of the Sunnyside coal mines in the same township. Further field work was done in this district by the Geological Survey in 1906 and the results published in 1909 in Bulletin No. 371.

By order of the Secretary, T. 14 N., R. 8 W., was on July 26, 1906, withdrawn from entry, filing, and selection. On December 17, 1906, this withdrawal was modified to apply to coal entries only.

On March 2, 1909, the Secretary issued instructions relative to coal lands which provided in part as follows:

Second. The Geological Survey will from time to time advise the General Land Office that it has completed the field work on certain townships, whereupon the register and receiver will be notified that the lands so enumerated are temporarily excepted from all form of entry pending receipt of classification plats and lists.

Pursuant to this order, on March 27, 1909, a report was rendered to the Commissioner that the land involved, among others, had been examined by the Geological Survey; and the Secretary, on April 2, 1909, temporarily withdrew the land, pending classification and appraisal.

By letter "N" of March 8, 1910, the Commissioner promulgated a classification and appraisal of the land as coal land, the N.  $\frac{1}{2}$  SE.  $\frac{1}{4}$  to be sold at \$150 per acre and the S.  $\frac{1}{2}$  SE.  $\frac{1}{4}$  to be sold at \$200 per acre.

From the data before the Department there can be but little doubt that prior to June 8, 1909, the date of acceptance of the township plat, the lands were known to be coal in character, and, if so known, did not pass to the State. United States *v.* Sweet (245 U. S., 563);

State of Utah *v.* Allen *et al.* (27 L. D., 53); State of Utah (32 L. D., 117).

A determination of this fact, however, does not decide the rights of this appellant; for, as was stated in Rule 1 of the circular of instructions approved by the Department March 6, 1903 (32 L. D., 39):

Rule 1. When a school section is identified by the government survey and no claim is at the date when the right of the State would attach, if at all, asserted thereto under the mining or other public land laws, the presumption arises that the title to the land has passed to the State, but this presumption may be overcome by the submission of a satisfactory showing to the contrary.

In the case of Albert E. Dorff, *supra*, it was, in effect, held that a classification of lands as coal in character, prior to the attaching of the State's grant, was a "claim" by the United States which prevented any presumption of State ownership from arising; and in the case of State of Utah *v.* Lichliter *et al.*, *supra*, held that a petroleum reserve, based upon geologic data indicating petroleum value, stamped the land with a *prima facie* mineral character, and excepted it from the grant to the State for school purposes because of the provision in section 6 of said act excepting reserved lands from said grant.

The ultimate question is, therefore, whether the SE.  $\frac{1}{4}$ , Sec. 2 was, on June 8, 1909, either reserved or classified as coal in character; for, if it occupied either status, the lands were, *prima facie*, public land of the United States when this appellant filed his application, and the burden of proving title is upon the State.

As shown, the temporary withdrawal of April 2, 1909, was based upon data obtained from field investigations which had shown that the land in the vicinity was coal in character, and was made for classification and appraisement. As the appraisement was to be made for the purpose of determining the prices at which the coal lands were thereafter to be disposed of under the coal-land laws, and as those laws required that entries be made by legal subdivisions of the public-land surveys, such appraisements were, of necessity, withheld until survey of the lands, in order that the appraisement could be made in terms of such surveys. See section 6 of regulations under the coal land laws, approved April 12, 1907 (35 L. D., 665).

Under the practice indicated, there could be no classification of lands prior to survey which would destroy the presumption that the State's school grant attached, in cases where such survey was the only thing required to put such grant into effect; and, unless it can be held that the temporary withdrawal of the land from all form of entry for the purpose of classification was such a reservation as was expressly excepted by the State's enabling act, the

presumption arose, upon acceptance of the plat of survey, that the grant had operated and title had passed to the State.

The classification and appraisal of March 8, 1910, resulted in the restoration of certain of the lands from the withdrawal, as noncoal, which indicates that the temporary withdrawal was not made upon definite geologic information as to all the land, but through caution lest the lands might prove to be within the coal-bearing area. Temporary withdrawals of this character do not constitute a "reservation" within the meaning of section 6 of the act of July 16, 1894, *supra*, or the term as used in the decision in the case of *State of Utah v. Lichliter et al.*, *supra*. It seems manifest that there must, in such cases, have been a conclusion reached that lands had some special value and a segregation or reservation of them for disposal under special acts because of such value. The reservation of lands or mineral deposits by its nature presupposes a determination or *classification* of land as of the character for which it is reserved.

In other words, so far as lands valuable for oil and gas deposits and coal deposits are concerned, a coal *classification* and a petroleum *reservation* have the same effect, i. e. impress the land with a *prima facie* mineral character. Temporary withdrawals made prior to such classification or reservation merely for the purpose of withholding the land from further disposition under the public land laws until further investigation has been made and a decision arrived at as to the character of the land and its chief value, have no effect as raising any presumption as to the character of the land, nor do they dedicate it to any special purpose or reserve it for any special form of disposal. When, therefore, the final act is performed which, under the law, would permit a school grant to attach, and there has been no reservation of the land as *mineral* or classification which stamps it with the same character, the presumption arises that it became the property of the State under its grant.

As the SE.  $\frac{1}{4}$ , Sec. 2, herein involved, was not classified as coal until after the approval of the survey, the lands became, *prima facie*, school lands of the State of Utah at that time. The fact that the lands were *known* to be coal in character does not, of itself, destroy this presumption. But, as it is only a presumption of title, the Government can, at any time, by assuming and sustaining the burden of proof at a hearing, should one be desired by the State, show that the lands were *known* to be coal in character at the time of survey, and destroy this presumption.

Nor is it material that, under the practice then prevailing, coal lands were seldom classified until after survey, when appraisal was also made in terms of legal subdivisions. This practice, perhaps unwise, can not, because of its defects, alter its effect; nor can it be

construed into what it should have been; i. e., a definite classification before survey and further withdrawal until after survey, pending appraisal.

The State's claim to the land had never been disproved when this appellant filed his application to purchase; and, as this brings it within the rule stated in the Braffet case, and the cases cited therein, the Commissioner correctly held that he only occupied the status of a contestant, and properly rejected his application. The passage of the general leasing law of February 25, 1920 (41 Stat., 437), precludes disposition of this land, should the State's claim be defeated, except by lease of the coal deposits.

The Commissioner's decision is affirmed, and the case is closed.

### WILFORD H. HUDSON.

*Decided May 31, 1924.*

#### RECLAMATION—PAYMENT—APPLICATION—DESERT LAND.

The power of Congress to delegate to an agency of a State the authority to provide for the reclamation of public arid lands within a State irrigation district, and the right of such instrumentality to assess the lands for the cost of their reclamation, can not be questioned by a mere applicant to make a desert-land entry.

#### LAND DEPARTMENT—COURTS—JURISDICTION—PUBLIC LANDS—STATUTES.

It is exclusively within the province of the courts to declare an act of Congress unconstitutional, and, until an act dealing with the public lands is finally determined by the courts to be unconstitutional, it is the duty of the Land Department to administer it as Congress directs.

#### COURT AND DEPARTMENTAL DECISIONS CITED, DISTINGUISHED AND APPLIED.

Case of *McCulloch v. Maryland* (4 Wheat., 316), cited and distinguished; case of *Virinda Vinson* (39 L. D., 449), cited and applied.

#### FINNEY, *First Assistant Secretary*:

This is an appeal by Wilford H. Hudson from decision of January 9, 1924, by the Commissioner of the General Land Office holding for rejection his application to make desert-land entry for the NE.  $\frac{1}{4}$  and SE.  $\frac{1}{4}$  NW.  $\frac{1}{4}$  of tract 199 in Secs. 16 and 17, T. 15 S., R. 13 E., S. B. M., California, containing 200 acres.

It appears that said lands were embraced in a prior entry which was canceled on relinquishment presented with Hudson's application. They are within the Imperial Irrigation District organized under the laws of the State of California. The project was approved by this Department February 26, 1921, as meeting the conditions provided in the act of August 11, 1916 (39 Stat., 506). By that approval all unentered lands and all entered lands for which no final certificates had been issued were brought within the operation of the said act of August 11, 1916, whereby they were impressed with

the lien therein provided for the apportioned cost of constructing, acquiring, purchasing, or maintaining the canals, ditches, etc., in connection with the irrigation project under the irrigation district laws. That act also provides that no more than 160 acres of such lands may be entered by any one person.

The stated objections to the allowance of Hudson's application were that it was for 40 acres in excess of the area permitted under the law referred to and that he had not removed the lien representing the benefit charges, interest, and penalties incident to assessments made by the irrigation district.

Section 6 of the act of August 11, 1916, in part provides:

In any case where any tract of entered land lying within such approved irrigation district shall become vacant by relinquishment or cancellation for any cause, any subsequent applicant therefor shall be required, in addition to the qualifications and requirements otherwise provided, to furnish satisfactory proof by certificate from the proper district or county officer that he has paid all charges then due to the district upon said land and also has paid to the proper district or county officer for the holder or holders of any tax certificates, delinquency certificates, or other proper evidence of purchase at tax sale the amount for which the said land was sold at tax sale, together with the interest and penalties thereon provided by law.

The appeal is confined to that portion of the action requiring payment of the assessment and the accrued charges amounting to \$1,521.15, and the contention made by appellant is that the act of August 11, 1916, *supra*, is unconstitutional. The line of reasoning is that the act in question virtually undertakes to confer upon an instrumentality of a State the power to tax Government property, and that this is an unauthorized delegation of power plainly repugnant to the Federal Constitution as construed by Chief Justice Marshall in the case of *McCulloch v. Maryland* (4 Wheaton, 316).

That case involved no question of delegation of power by Congress. It concerned the question of the validity of a State law authorizing a tax on the operations of a Federal bank established by authority of Congress. The bank was an instrumentality established and employed by the Government to accomplish the execution of national functions, and its taxation by the State had not been sanctioned by Congress. The decision held that the tax was repugnant to the sovereignty of the Nation and unconstitutional. There is no intimation to be found in the full discussion of that case by the court which could in the least suggest the thought that Congress could not have authorized such tax. Indeed there was much said in the decision in respect to the powers of Congress which would warrant the inference that Congress in the exercise of its power to charter the bank could have conferred the power on such terms as it desired and could have authorized the imposition of such a tax if it had elected to do so. Certainly that case has no

direct bearing on the question here presented because the situation is wholly different.

By section 3 of article 4 of the Federal Constitution, Congress is authorized to "dispose of and make all needful rules and regulations respecting the Territory or other property belonging to the United States."

This land is property of the United States and is appropriately the subject of legislation by Congress. By various acts different methods have been provided for the development and disposal of the desert lands of the public domain. Under the original desert land act of March 3, 1877 (19 Stat., 377), as amended by the act of March 3, 1891 (26 Stat., 1095), the individual entryman was required to obtain his water supply either by development of irrigation works or the purchase of water from some accessible project otherwise developed.

Under the so-called Carey Act of August 18, 1894 (28 Stat., 372, 422), and acts amendatory thereof or supplemental thereto extensive grants of desert lands were made to the public land States as an aid in the reclamation, settlement, and disposal of such areas. Under that system the States as a condition of the grant were required to reclaim the lands or cause same to be reclaimed from their desert condition.

By the act of June 17, 1902 (32 Stat., 388), and supplemental acts, Congress provided a method by which the Government itself undertook the reclamation of vast areas in a number of the States where arid lands existed.

In all of these several methods the cost of reclamation is ultimately borne by the entryman or purchaser. The act here in question is merely a different method employed to accomplish a similar object, namely, reclamation of lands worthless in their arid condition so that they may become suitable for the growth of agricultural products. It is merely a device by which the irrigation district is permitted to develop Government property, taking the place for that purpose of the individual, the State or the National Government as contemplated in other laws above referred to. The assessment charges made for the service performed is not a tax for general or governmental purposes, if indeed it may properly be denominated a tax in any sense. It is an improvement or benefit charge. Theoretically at least, it is no burden, for the improvement of the land is commensurate with the charge, and equal value is received by the purchaser for the money paid whether he buy raw land or land already developed or in process of development. At any rate, it can not be doubted that Congress has ample authority to provide such method for development and to fix the conditions upon which such lands may be entered. Certainly a

mere applicant has no such interest as will permit him to thwart the will of Congress. He is invited to make entry upon the terms specified. It is his privilege to decline the invitation, but he may not change the terms.

This law is essentially similar in principle to the act of May 20, 1908 (35 Stat., 169), by which the public lands in the State of Minnesota were made subject to the State drainage laws. The purpose of the latter was designed to relieve the wet lands of Minnesota of excess moisture. The one provides for irrigation of arid lands, while the other provides for drainage of wet lands. Both are to be accomplished through the operation of State laws much in the same manner. See also similar act of January 17, 1920 (41 Stat., 392), making local drainage laws applicable to certain public lands in the State of Arkansas.

These laws have been administered by this Department without question as to their constitutionality. Even admitting the possibility that a court might criticize that provision of the act recognizing the obligation of entrymen for irrigation charges against their lands which were entered prior to the approval of the project by the Department, yet such objection could not reasonably be made in a case like the present where the claimant is a mere applicant who has no contractual relations with the Government and therefore no question of violation of contract is involved.

Moreover, the attitude of this Department is that the duty of administration imposed upon it by any law should be performed in the absence of final court decision holding the statute to be unconstitutional. *Virinda Vinson* (39 L. D., 449).

The decision appealed from is found to be correct and is accordingly affirmed.

**JACKSON v. PEWTERS ET AL.**

*Decided May 31, 1924.*

**OIL AND GAS LANDS—SOLDIERS' ADDITIONAL—APPLICATION.**

The designation of land as being within the geologic structure of a producing oil field after the filing of an application to make a soldiers' additional entry thereof is not a ground for the rejection of the application.

**OIL AND GAS LANDS—PROSPECTING PERMIT—SOLDIERS' ADDITIONAL—SURFACE RIGHTS.**

Where an oil and gas prospecting permit has been issued prior to the initiation of a claim under the nonmineral land laws, an entry may be allowed only as to the surface, and subject to the prior right of the permittee to the use thereof as prescribed in section 29 of the leasing act, and the permittee should be afforded an opportunity to show cause why a surface entry should not be allowed.

## OIL AND GAS LANDS—PROSPECTING PERMIT—SOLDIERS' ADDITIONAL—SURFACE RIGHTS—EVIDENCE.

An entry for land segregated by the prior issuance of an oil and gas prospecting permit can be allowed only for so much of the surface as is not necessary for the operations of the permittee, and the fact that the geologic structure within which the land is situated is producing is a circumstance properly to be considered, but does not change the situation as to the rights of the parties.

## OIL AND GAS LANDS—PROSPECTING PERMIT—SOLDIERS' ADDITIONAL—RIGHT OF WAY—SURFACE RIGHTS—TRESPASS.

While an entry upon land, segregated by a previously issued oil and gas prospecting permit, and the construction of a reservoir thereupon without protest by the permittee, in anticipation of the allowance of a soldiers' additional homestead application which depended wholly upon departmental discretion for its validity, is not an entry under color of right, but a trespass, yet where it is shown that the reservoir is reasonably essential to the working of the land under lease and that the interests of the Government will best be protected through the granting of a revocable permit, an easement may be granted pursuant to the act of February 15, 1901.

## DEPARTMENTAL DECISION CITED AND APPLIED.

Case of *Carlin v. Cassriel* (50 L. D., 383), cited and applied.

FINNEY, *First Assistant Secretary*:

This appeal raises the question whether the Commissioner of the General Land Office erred in his decision of October 20, 1923, rejecting the soldiers' additional homestead application filed on October 3, 1922, by Robert P. Jackson, for the S.  $\frac{1}{2}$  NW.  $\frac{1}{4}$ , Sec. 23, T. 35 N., R. 2 W., M. M., Great Falls, Montana, land district; and whether, upon the facts now disclosed, said entry should be allowed.

At the time the Commissioner rendered his decision the record disclosed that the area involved was within the known geologic structure of the Kevin-Sunburst oil field, as defined on December 9, 1922, and within a permit to prospect for oil and gas issued on September 29, 1922, to John F. Pewters and Walter E. Andersch, pursuant to section 13 of the leasing act of February 25, 1920 (41 Stat., 437). In said decision it was held that said application must be rejected, although made with a reservation of the oil and gas to the United States pursuant to the act of July 17, 1914 (38 Stat., 509), and with a reservation of full rights to prospect, in the permittees, pursuant to section 29 of the leasing act. As authority for this action the Department's instructions of October 6, 1920 (47 L. D., 474) were cited, and the following quoted therefrom:

You will reject all applications to enter, file upon, or select under the non-mineral land laws, lands which have been or shall be designated by the Department as being *within* the known geologic structures of producing oil or gas fields.

Jackson appealed from this decision, and the Department, prior to consideration thereof, noted that the permittees, who discovered oil

on March 15, 1923, in the NW.  $\frac{1}{4}$  NW.  $\frac{1}{4}$ , Sec. 22, and are now applicants for lease, had not been allowed to protest the surface entry, and directed that such opportunity be afforded them. Such notice issued, and Pewters and Andersch protested, alleging that the use of the entire surface of the land was essential to the development contemplated when the lease authorized to them issued by the Department.

This protest was answered, and from showings made therein the additional facts are disclosed: That Jackson, on October 3, 1922, contracted with the Sunburst Oil and Gas Company to convey surface title to the land to said company as soon as patent issued to him under his proposed entry; that on October 28, 1922, the Homestake Exploration Company contracted with the permittees to drill upon the land covered by said permit and to develop said land under any lease which issued to them; that on November 14, 1922, the Sunburst Oil and Gas Company contracted with the Ohio Oil Company to convey to it an undivided one-half interest in the surface of the land as soon as Jackson secured patent and conveyed title to the first company; that on April 12, 1923, the Homestake Exploration Company contracted with the Sunburst Oil and Gas Company and the Ohio Oil Company for the sale to said Homestake Exploration Company of water from a reservoir constructed by them upon the S.  $\frac{1}{4}$  NW.  $\frac{1}{4}$ , Sec. 23. This reservoir was, apparently, constructed during the months from December, 1922, to May, 1923, and, with cost of repairs and the purchase price of the soldiers' additional scrip (\$1,342.12), is alleged to represent an investment of \$6,594.51, and to have a capacity of 445,000 barrels.

In the appeal, answer, briefs, and oral argument the claim by Jackson is that, as his application preceded the designation of the producing structure and is for the surface only, he is entitled to have it allowed; and that the permittees are estopped to object to its allowance because of their failure to protest against the construction of the reservoir and the recognition of the reservoir as the property of his "agents," the Sunburst Oil and Gas Company and the Ohio Oil Company, by the Homestake Exploration Company, which latter company is claimed by the appellant to be assignee of the permit.

Pewters and Andersch allege that the entire surface will be required by them in the compliance with the terms of their lease, citing the requirement of such leases that at least one well be drilled on each forty-acre tract; and that the reservoir was constructed, pursuant to the right given them by such leases, for their use and benefit, by the two companies in privity with Jackson. All parties agree that the reservoir will be an aid to the drilling of the area.

The Department concludes that the Commissioner erred in rejecting appellant's application solely because the area was, at the time of decision, within a producing oil field. Such action was contrary to the principles stated in departmental instructions of April 23, 1921 (48 L. D., 98), and applied in a different form in the case of Louise E. Johnson (48 L. D., 349). To that extent the appellant is correct in his contentions.

Where, however, an oil and gas prospecting permit has been issued prior to the initiation of a claim under the nonmineral land laws, such entries may only be allowed as to the surface, and subject to the prior rights of the permittees, who are to be regarded as potential "lessees," as that term is used in section 29 of the leasing act.

The Commissioner, therefore, should have called upon the permittees to show cause why the surface entry should not be allowed, and rendered such decision as the facts warranted, subject to the right of either party to appeal therefrom.

The land being segregated by the prior permit, the Department can only allow this entry, in its discretion, if it appears that such surface is not necessary to the operations of the permittees, and only such surface as is not necessary to them can be acquired. The fact that the structure is now producing is a circumstance properly to be considered, but does not change the situation as to the rights of the parties.

From the showings made, the Department finds that the Homestake Exploration Company is not the assignee of the permittees, but their agent; that, as such agent, it contracted, within the apparent scope of its authority, for the *purchase* of water from the companies who, without protest from it or its principals, had entered the land and constructed the reservoir. Upon these facts the claim of the appellees that the reservoir was constructed for their use and benefit is untenable. The entry upon the land and the construction of the reservoir, in anticipation of the allowance of an application which depended wholly upon departmental discretion for validity, was not an entry under a color of right but a trespass. *Carlin v. Cassriel* (50 L. D., 383).

The matter is not, therefore, one between the parties, but, primarily, one between the appellant and the United States.

There is reserved to the United States in sections 11 and 12 of the permit held by the appellees, and in sections 3 (a) and 3 (b) of the lease authorized to be issued to them and heretofore executed by them, the right of the Government to grant such easements and rights of way as may be necessary or appropriate to the working of such lands or other lands, and also to allow surface entries under the conditions of section 29 of the leasing act.

Upon the facts presented, the Department is of the opinion, and so holds: (1) That this reservoir is reasonably essential to the working of the land under lease; (2) that, while the appellant and his alleged "agents," who by their contract appear in fact to be principals, made the reservoir in trespass, there is nothing shown which gives the appellees any claim thereto, either legally or equitably (at the oral argument of the case, they offered the contract between their agent and the two companies who constructed the reservoir as safeguarding the rights of the parties, and the Department will not give them rights in excess of those contracted for); (3) that the interests of the Government will best be protected through the granting of a revocable permit to use the land for reservoir purposes, pursuant to the act of February 15, 1901 (31 Stat., 790); and an application for such permit will be favorably considered unless objections not now apparent are disclosed.

The appellant has protested the issuance of the lease to the appellees as injuring possessory rights which he has in the land. As shown herein the companies entered the land as trespassers, and his scrip location was made for lands which could only be disposed of, under the law, subject to the rights of the mineral claimants. Clearly neither the appellant nor the two oil companies associated with him have any standing which entitles them to protest the issuance of a lease pursuant to the terms of the act of February 25, 1920, *supra*, to the prior claimants. The protest is dismissed and the leases have this date been awarded.

The soldiers' additional application is finally rejected, the Commissioner's decision is modified to conform to the views herein expressed, and the records are returned to the General Land Office for action in accordance herewith.

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### FRED S. PORTER ET AL.

*Decided May 31, 1924.*

#### MINING CLAIM—WATER RIGHT—PATENT.

The use of water in a shaft for the grazing of cattle by the locator upon lands within his mining location is merely incidental to the primary purpose of the claim and does not affect the locator's right to a patent in the absence of abandonment or forfeiture of the claim where a discovery of mineral and the expenditures prescribed by the mining laws as prerequisite to patent had been made.

#### SCHOOL LAND—INDEMNITY—SELECTION—MINERAL LAND—PATENT—SECRETARY OF THE INTERIOR—LAND DEPARTMENT—JURISDICTION—ARIZONA—STATUTES.

Congress in providing in section 29 of the act of June 20, 1910, that indemnity school selections by the State of Arizona should be made subject to the approval of the Secretary of the Interior, who is charged with the duty

of determining the character of public lands, intended that such approval should constitute a finding that the lands were of a character which made them subject to selection under the act and be equivalent to a patent, thus depriving the Land Department of further jurisdiction thereover, even though the determination as to the character of the land was erroneous; after such approval the provision of section 2449, Revised Statutes, that the question of mineral character shall remain open, is inapplicable.

DEPARTMENTAL DECISIONS CITED, APPLIED, AND DISTINGUISHED.

Case of Sewell A. Knapp (47 L. D., 152), cited and applied; case of Grand Canyon Railway Company *v.* Cameron (36 L. D., 66), cited and distinguished.

FINNEY, *First Assistant Secretary*:

Fred S. Porter and Earl H. Porter, who, on May 21, 1923, filed a mineral application for patent for the Mamie lode mining claim, survey No. 3341, for 20.66 acres in E.  $\frac{1}{2}$ , Sec. 21, T. 16 N., R. 1 E., G. and S. R. M., Phoenix, Arizona, land district, have appealed from the decision of the Commissioner of the General Land Office dated January 2, 1924, which held said mineral application for rejection unless it was shown that the claim was being used for mining and not for watering purposes, and also held, as to certain of the lands in said claim, that the certification of said lands to the State of Arizona, under an indemnity school selection, was a declaration by that office that the land was nonmineral and was not, therefore, subject to inclusion in a mineral entry.

The records disclose that a mining location was made for the area involved on July 2, 1907, by predecessors in interest of these appellants, and that a discovery of mineral ore chiefly valuable for gold and copper was made. It was further shown that there had been expended upon the claim at the time of mineral survey in 1916 the sum of \$1,800 in the erection of a cabin and the sinking of a discovery shaft 4 feet by 6 feet by 20 feet, as shown by the field notes and plat of mineral survey made in November, 1916. Special agent's reports, rendered in August, 1919, and September, 1923, indicate that the shaft was down to the depth of 120 feet in 1919, and in 1923 was to the depth of 265 feet, with an undetermined amount of drifting. The shaft was reported to be timbered, and in 1923 water stood therein at 120 feet. In 1919 and in 1923 this water was being pumped for the watering of stock. It is stated by counsel for the appellants that they are lessees of the remainder of the section from the State. Said land is apparently leased for grazing purposes.

These circumstances were held by the Commissioner to establish that *these* mineral applicants had never used the claim for mining purposes and to warrant the rejection of the application in its entirety. As authority for this proposition the Commissioner quoted from the opinion of the Attorney General to Secretary of War (1 L. D., 552, 554) in so far as the Attorney General said, "The object

of those laws (mining laws) is to promote the development of our mining resources rather than the sale of the mineral lands," and added, "and I fail to see how the development of the mining resources on this land is to be accomplished by the use of the shaft for a water hole instead of for mining purposes." He further cited the case of *Grand Canyon Ry. Co. v. Cameron* (36 L. D., 66), and quoted the following therefrom (page 71):

Lands belonging to the United States can not be lawfully located, or the title thereto by patent legally acquired, under the mining laws for purposes or uses foreign to those of mining or the development of minerals.

Neither of the cases cited has any similarity as to facts to the case now under consideration, nor can the quotations by the Commissioner be construed to have the meaning which he sought to impart to them. In the Attorney General's opinion, the question was whether lands which were located under the mining laws, but for which patent had not been sought, could be included in a military reservation. The ruling was that these lands were, so far as possessory rights were concerned, the exclusive property of the locators; and the language quoted by the Commissioner prefaced a conclusion that, as the primary purpose of the mining laws was to encourage the development of minerals, the mining laws permitted the locators to hold the land, in accordance with the laws and customs of miners, "without requiring the miner to buy or pay for the land." It is well settled that a mining locator who has made a discovery of minerals and has made the expenditures prescribed by the mining laws as prerequisite to patent may, in the absence of abandonment or relocation by another, "demand and receive a patent at a small sum per acre." *Cole v. Ralph* (252 U. S., 286); *The Marburg Lode Mining Claim* (30 L. D., 202).

Nor is the quotation from the decision in the case of the *Grand Canyon Ry. Co. v. Cameron*, *supra*, applicable here. As held therein, it is undoubtedly within the power of the Department to inquire into the mineral character of lands and to proceed against mining locations where lands are not mineral and are not being held for mining purposes (*Lane v. Cameron*, 45 App. D. C., 404; *Cameron et al. v. United States*, 252 U. S., 450.); and it may also consider the use to which lands are being put, when a mineral application is filed. *Stanislaus Electric Power Co.* (41 L. D., 655). But, as above shown, it can not impair rights acquired in lands shown by discovery to be mineral and to have been claimed and possessed in complete compliance with the mining laws.

In the cases cited above, no valid discoveries had, in fact, been made. In this case, there is nothing of record which impeaches the claims of discovery, or expenditures sufficient to entitle the appellants

to apply for a patent. The claim once valid could only be terminated by abandonment or forfeiture. The former is a matter of intent (*Black v. Elkhorn Mining Co.*, 163 U. S., 445), which is to be arrived at from consideration of the acts of the parties. *Lakin v. Sierra Buttes Gold Mining Co.* (25 Fed., 337). Forfeiture results from failure to perform annual assessment work under the mining statutes, and a location of the land by another. *Goldberg v. Bruschi* (146 Cal., 708; 81 Pac., 23).

As to the facts in this case, the records disclose that from 1919 to 1923, the shaft was deepened and timbered. Expenditures in this work were claimed as annual assessment labor, for the years 1919, 1920, and 1922, or until patent was applied for. The relation of this work to the improving of the mine is so direct that no question would reasonably have arisen had the water been pumped from the shaft and wasted. The fact that these appellants have seen fit to utilize it, and at the same time to continue work on the shaft of a character which rendered it more fit for *mining* without appreciably improving it as a source of water, convinces the Department that the utilization of the water is merely an exercise of commendable business judgment, as to an incidental matter, and not an act of bad faith which should imperil the claim of these appellants. If such utilization enhances the value of the land above what it may conceivably be worth for mineral deposits, such enhanced value is the direct result of the work of these appellants, and is incidental to the primary purpose of their claim, as made and still asserted. Incidental advantages other than mineral values do not render mining claims invalid. *United States v. Iron Silver Mining Company* (128 U. S., 673).

The Department finds that there has been no abandonment or forfeiture of this claim.

There remains for consideration the conflict of this mining claim with the school indemnity selection of the State. This selection was filed April 10, 1917, for all of said Sec. 21. On May 7, 1920, adverse proceedings were initiated by the Land Department, on a charge of mineral character based upon reports of special agents of the Land Department that a discovery of mineral had been made in this mining location. The State defaulted, and its selection was canceled as to the E.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , SW.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ , Sec. 21. The adverse proceeding was only as to the forty-acre tracts described, apparently because it was not observed that said claim embraced a small tract in the NW.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ , Sec. 21, and included extremely small areas in the NE.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , and NW.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , said section. On May 31, 1923, 10 days after the mineral application was filed, the Secre-

tary approved the selection as to the W.  $\frac{1}{2}$  SE.  $\frac{1}{4}$ , NW.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ , Sec. 21, in approved list No. 72.

In finding that the lands were nonmineral, because so found "by this office," the Commissioner evidently had in mind the proposition that the passing of title to public lands by approval, certification, or patent, raises a presumption that due inquiry has been made by the Land Department as to the character of the land, and such final action is, in effect, a declaration by it that the land is of the character contemplated by the laws under which title was passed. *Buena Vista Petroleum Co. v. Tulare Oil & Mining Co. et al.* (67 Fed., 226); *Burke v. Southern Pacific Railway Co.* (234 U. S., 669). Such is undoubtedly the rule where the proceedings in the Land Department have been regular and free from fraud or mistake. Here, however, the list as approved included lands within a valid mining location, which lands were known at the time of selection, approval, and certification, to be mineral lands.

Even in cases of fraud or mistake by the Land Department, the general rule has been to regard the issuance of patent as a conveyance which removed further control of the land from the jurisdiction of the Land Department, until such jurisdiction was restored by the cancellation of the conveyance by the courts. *Noble v. Union River Railroad Company* (147 U. S., 165); *Germania Iron Company v. United States* (165 U. S., 379). And the Department has held that certification was the equivalent of patent. *Rouse v. State of Montana* (30 L. D., 543); *Cole et al. v. State of Washington* (37 L. D., 387).

Following the decision of the Supreme Court in the case of *Weeks v. Bridgman* (159 U. S., 541), the Department held, on numerous occasions, that the certification of lands which were known to be mineral in character or otherwise not of the character authorized to be certified, or were embraced in valid entries at the time of selection, was null and void and constituted no bar to the patenting of these lands under appropriate land laws. *Edwin F. Frost et al.* (24 L. D., 228); *State of South Dakota* (26 L. D., 347); *Manser Lode Claim* (27 L. D., 326); *Ewing v. McKinzey et al.* (30 L. D., 410).

These decisions, however, have been based upon the provisions of the act of August 3, 1854 (10 Stat., 346), or section 2449, Revised Statutes, which expressly provides:

Where lands have been or may hereafter be granted by any law of Congress to any one of the several States and Territories, and where such law does not convey the fee-simple title of the lands, or require patents to be issued therefor, the list of such lands which have been or may hereafter be certified by the Commissioner of the General Land Office, under the seal of his office, either as originals or copies of the originals or records shall be regarded as con-

veying the fee-simple of all the lands embraced in such lists that are of the character contemplated by such Act of Congress, and intended to be granted thereby; but where lands embraced in such lists are not of the character embraced by such Acts of Congress, and are not intended to be granted thereby, the lists, so far as these lands are concerned, shall be perfectly null and void, and no right, title, claim, or interest shall be conveyed thereby.

In the case of Sewell A. Knapp (47 L. D., 152, and, on petition, 47 L. D., 156), the Department, following the views stated by the Attorney General on November 19, 1915 (30 Ops. Atty. Gen., 485), wherein he distinguished grants to States in which selections were to be "subject to approval by the Secretary" from the provisions of the act of August 3, 1854, or section 2449, Revised Statutes, *supra*, held that in the former case approval by the Secretary was the same as a patent, and subject to correction or cancellation only by action in the courts.

Section 29 of the granting act of June 20, 1910 (36 Stat., 557), under which this school selection was made, provides—

That all lands granted in quantity, or as indemnity, by this act, shall be selected, under the direction and *subject to the approval of* the Secretary of the Interior, from the surveyed, unreserved, *unappropriated*, and *nonmineral* public lands of the United States \* \* \*. [Italics supplied.]

As the Secretary is charged with the duty of determining the character of public lands and the qualifications of claimants of such lands, it seems clear that in providing that selections under the act of June 20, 1910, *supra*, should be subject to his approval, the Congress contemplated that such approval would only be given after a determination of the essentials precedent to a valid location under said act rather than that the determination of them should remain open as provided by section 2449, Revised Statutes, *supra*, which was limited to cases where certification was by the Commissioner of the General Land Office, who lacked the broader jurisdiction and duties.

It seems clear, therefore, that the Department can not issue patent to these claimants for the whole of their claim until and unless the State's title is divested as to the areas erroneously certified to it; for a patent (or other conveyance by the Government) conveys title to all the lands within the established boundaries shown by the official plats of the Government surveys. *Hardin v. Jordan* (140 U. S., 371).

Although these appellants have expressed a willingness in their appeal to accept patent for all the areas not certified to the State, the Department is of the opinion that the State should be requested to reconvey the areas improperly acquired and to accept a new approved list in terms of an adjusted survey. Such reconveyance can be accepted by the Commissioner. *San Francisco Mining Co.* (29 L. D., 397); *Walter Tryon* (29 L. D., 475).

An amended adjusted plat of survey will be necessary in any event.

The Commissioner's decision is reversed as to the validity of the claim, and the case remanded for action in accordance with the views herein expressed. If the State declines to surrender the excess areas acquired, action will be taken looking to the issuance of a patent to these appellants as to the remaining land in view of the small areas involved and of their willingness to accept patent for the reduced area.

### CHARLES WEST (ON PETITION).

*Decided May 31, 1924.*

#### OIL AND GAS LANDS—PROSPECTING PERMIT—APPLICATION—OKLAHOMA.

The allowance of an application for any interest in public lands is, as a rule, controlled by the status of the land at the time of the allowance, rather than at the date of the application, and where, at the time action upon an application for a permit to prospect for oil and gas in the bed of Red River, Oklahoma, was taken, the lands were *sub judice*, rejection of the application was proper.

#### OIL AND GAS LANDS—PROSPECTING PERMIT—APPLICATION—OKLAHOMA.

No such right is acquired by the filing of an oil and gas prospecting permit application under the act of February 25, 1920, as will prevent its allowance from being controlled by circumstances arising after its presentation or its rejection under later statutes.

#### FINNEY, *First Assistant Secretary*:

The question now up for consideration in this case is as to whether the facts and circumstances involved justified the rejection of Charles West's application for an oil and gas prospecting permit, and a full understanding calls for a somewhat detailed recital of the pertinent facts.

In its decision of March 16, 1896, in the case of *United States v. Texas* (162 U. S., 1), it was held by the Supreme Court that the south bank, and not the middle, of the channel of Red River formed the south boundary of Oklahoma, and notwithstanding that declaration, title or interests were later asserted to the lands between the south bank and the middle line of the river, adverse to the Government, on the assumption that those lands belong to the State of Texas and its grantees and not to the United States.

This contention resulted in a suit by the State of Oklahoma against the State of Texas in the Supreme Court of the United States, to establish the true boundary, and while that suit was pending, Charles West, on March 6, 1920, caused notices to be posted on certain lands of that character, preliminary to the presenting of his application for the permit mentioned, under section 13 of the oil and gas leasing act of February 25, 1920 (41 Stat., 437).

On March 29, or ten days after West had filed his application for the permit, on March 19, 1920, a petition for intervention in that suit was filed by the United States in its own interest as the owner of the lands in question and as trustee for Indian allottees. That petition was granted April 1, 1920, and shortly thereafter an injunction issued restraining Texas from attempting to dispose of any of the land, and a receiver was appointed to take charge of the land covered by West's application and the other lands in dispute.

On May 29, 1920, the register and receiver forwarded West's application to the General Land Office with their statement that "it appears to conform to the regulations and that there were no conflicting claims on March 19, 1920," the date on which West's application was filed.

On June 18, 1920, Secretary Payne called the attention of the register and receiver at Guthrie to the pending suit and instructed them to reject promptly all applications under the leasing act, because—

Only upon the termination of the pending litigation in favor of the Government will the Land Department be in a position to receive and pass upon the merits of any application presented, and at such time the ground may be deemed proven territory and subject to lease exclusively under competitive bidding. To receive and suspend such applications at this time would only encumber the files and records and lead to confusion.

Pursuant to Secretary Payne's direction, West's application was rejected, and he attempted to support his appeal from that action by stating the facts relating to his posting of notice and presentation of application prior to the Government's intervention, and he also alleged that prior to the appointment of the receiver he had contracted for the drilling and development of the land for oil, erected a derrick and other equipment at a cost of about \$5,000, and otherwise complied with the pertinent and controlling regulations.

When West's appeal came up for consideration, Secretary Payne, by his letter of September 8, 1920, called the attention of the General Land Office to the facts relating to West's case, and other similar cases, and then stated, among other things, as follows:

Upon careful consideration of the entire matter, I have reached the conclusion that the interests of the United States, as well as those of the appellants here, warrant and require a modification of the instructions of June 18, 1920, and you are accordingly authorized and directed to suspend each and all of the applications herein described pending the outcome of litigation involving the ownership and status of the lands upon which the claims are laid.

April 11, 1921, the Supreme Court held that its decision of March 16, 1916, was controlling in fixing the south bank of the Red River as the boundary line between Texas and Oklahoma (256 U. S., 70); and on June 1, 1921. (256 U. S. 602, 605), that court gave consideration to the claims of a number of persons who asserted rights under the placer mining locations, and permitted them to intervene (in the

case of *Oklahoma v. Texas*, *supra*) ; and later by its decision of May 1, 1922 (258 U. S., 574, 602), the court held adversely to those claims on the ground that the mineral laws of the United States had never been extended to, and were not in force as to, the lands south of the mid-channel of the river. After fully reciting and considering the pertinent facts showing the status of those lands, the court said:

We conclude that this part of the river bed never was subject to location or acquisition under the mining laws—nor, indeed, to acquisition under any of the land laws—and therefore that these locations were of no effect and conferred no rights on the locators or their assigns.

With this situation existing, Congress on March 4, 1923, passed an act (42 Stat., 1448) for the relief of parties claiming under the placer mining laws, in which the Secretary of the Interior was authorized “to adjust and determine the equitable claims” of such persons in all cases where the lands “were claimed and possessed” by them or their predecessors in interest prior to *February 25, 1920*. That act authorized the issuance of permits and leases to such claimants who brought themselves within its provisions, and declared that nothing therein “shall be construed to interfere with the possession of the Supreme Court of the United States, through its receiver or receivers, of any part” of said lands. It was further declared in that act “that after the adjudication and disposition of all applications (for relief) under this act, any lands and deposits remaining unappropriated and undisposed of, after date fixed by order of the Secretary of the Interior, be disposed of in accordance with the provisions of said act of February 25, 1920.”

In the departmental instructions issued under that act, to the register and receiver (49 L. D., 467, 470), attention was called to the provisions of the act just quoted, and it was then stated that “due notice in accordance therewith will be given at the proper time, but until such notice is given no application can be received under said act of February 25, 1920, nor will any rights be acquired by any occupation prior to the announced date.”

Inasmuch as West's application was filed after February 25, 1920, and was not asserted under the provisions of the placer mining laws, the land he applied for comes within the class of lands last mentioned, and is not, and will not be, subject to applications such as his, until all claims for relief have been finally adjudicated and disposed of, and the notice mentioned in the instructions has been given. In view of this fact the General Land Office finally rejected West's application for a permit and closed his case on March 6, 1923.

That decision received departmental approval before it was promulgated, and West, not having been given the right of appeal, filed what he termed a motion for the exercise of supervisory power, in

which he set up the facts relating to the posting of his notice and the filing of his application; and he also stated in that motion that prior to the appointment of the receiver he had, at a cost of about \$8,000, erected a derrick, installed a drilling outfit, and was "doing all things up to the very point of spudding in for drilling when he was interfered with and prevented from further development by the receiver"; that because of that interference his improvements were destroyed by the weather, the wind, and the river, and that subsequently he expended a very great deal of time and money in attempting in all proper ways to get possession of the land and in maintaining his claim.

By its decision of August 29, 1923, this Department denied West's petition on the ground that the question as to the Government's title to the bed of the river was *sub judice* at the time West's application was filed; and for the further reason that Congress had by the act of March 4, 1923, *supra*, made special and specific provision for the disposition of the mineral deposits in said lands, which did not include the present allowance of applications such as West's. That decision was based on and supported by the decision in the cases of Robert D. Hawley (49 L. D., 578), and Red River Syndicate (49 L. D., 669), in which similar action was taken by this Department in kindred cases.

The case is now again up for consideration on West's further motion in which he urges that his application should be allowed at this time on the ground that the lands he applied for were subject to appropriation under the oil leasing act at the time his application was filed; that the land was not *sub judice* at the date of his application for the reason that the Government had not petitioned for or been granted intervention, and that his rights were not affected by the act of March 4, 1923, *supra*.

After giving these contentions and all features of this case full and careful consideration, this Department is still constrained to hold that the application was properly rejected, and that consequently the present motion can not be granted.

If the statement of the Supreme Court that this land was not subject "to acquisition under any of the land laws" of the United States is to be treated as controlling, and not considered as mere dictum, that statement alone, when considered in connection with the act of March 4, 1923, furnishes a complete reason why West's application can not be granted. While that statement may have been in a sense dictum, since it was not entirely essential to the court's holding that these lands were not subject to the placer-mining laws, it was in harmony with the fact that under the long-established rule lands belonging to the Government do not become subject to the laws permitting entries, etc., until there has been a

particular congressional or Executive declaration to that effect, and there was no such declaration as to these lands, which are located in Oklahoma, where that rule has been universally applied.

Be that as it may, the rejection of the application was fully supported by the mere fact that at the time it was presented, and ever since then, there was pending in the Supreme Court a suit which would in effect possibly result in a decree fixing the ownership of this land in the State of Texas or its grantees and declaring that it was not the property of the Federal Government. And the fact that the United States did not intervene in that suit until after West's application was presented is immaterial in so far as the present consideration is concerned, because it can not be expected that the Government would or should undertake to dispose of any land claimed by it while its title is seriously questioned in any tribunal having the power to render a decree which could establish the fact that the Government was without ownership.

But even if it be conceded that these lands were not, and did not, become *sub judice* until the Government was permitted to intervene in the case mentioned, as West urgently contends, that fact would not justify the allowance of his application because the allowance of an application for any interest in public lands is, as a rule, controlled by the status of the land at the time of the allowance, rather than at the date of the application, and these lands were not only *sub judice* at the time West's application was rejected, but they still have that status at this time, inasmuch as the court has not taken final action in relation to them, and Congress has, in effect, directed that applications such as West's shall not be allowed as long as that status continues.

Furthermore, the statute on which this application was based did not mandatorily require the allowance of every application for prospecting permit presented under it. It merely "authorized" the Secretary of the Interior to allow such applications and left it discretionary with him as to whether he would allow or reject them, accordingly as surrounding but not insurmountable circumstances should indicate. See Martin Wolfe (49 L. D., 625).

This being true, it follows that West did not gain such a right by the presentation of his application as would prevent its allowance or rejection from being controlled by circumstances arising after its presentation, or keep it from being rejected under later statutes such as the act of March 4, 1923, if, in the judgment of the Secretary, such rejection was called for by the controlling circumstances.

It is well settled that an application to enter or otherwise acquire an interest in public lands, and even preference rights conferred by statutes, may be defeated by the repeal or amendment of the law

under which they were presented, or by other subsequent congressional action, or even by a withdrawal of the lands by Executive action. See *Stebbins v. Croke* (14 L. D., 498); *Charles G. Carlisle* (35 L. D., 649); *State of Idaho v. Northern Pacific Railway Company* (39 L. D., 343); *Louisa Walters* (40 L. D., 196); *Henry Sanders* (41 L. D., 71); and *Walker River Irrigation District* (48 L. D., 197).

For these reasons the decision heretofore rendered in this case must be adhered to and the present motion is therefore hereby denied.

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### KENNETH G. MURRAY AND NORTHERN PACIFIC RAILWAY COMPANY.

*Decided May 17, 1924.*

#### RAILROAD LAND—RELINQUISHMENT—SETTLEMENT—STATUTES.

Neither the provisions of the act of July 1, 1898, nor those of the act of February 27, 1917, amendatory thereof, respecting relinquishments by the Northern Pacific Railway Company in favor of settlements upon unsurveyed lands within the limits of its grant, mandatorily require that company to relinquish or reconvey any tract of land within its grant in favor of a settler.

#### RAILROAD GRANT—PUBLIC LANDS.

The Northern Pacific Railway Company is the legal successor of the Northern Pacific Railroad Company with respect to the benefits of the grant of public lands made to the latter company.

#### COURT AND DEPARTMENTAL DECISIONS CITED AND APPLIED.

Cases of *United States v. Northern Pacific Railway Company* (256 U. S., 51), and *Gilfeather v. Northern Pacific Railway Company* (43 L. D., 433), cited and applied.

#### GOODWIN, *Assistant Secretary*:

This is an appeal by Kenneth G. Murray from the decision of the General Land Office of November 26, 1923, affirming the action of the Seattle, Washington, land office in denying his application (Seattle 04258), filed April 27, 1917, to make homestead entry, under section 2289, Revised Statutes, of lots 3, 4, 5, 6, Sec. 27, T. 23 N., R. 9 E., W. M., upon the ground that the tract applied for was within the place limits of the grant to the Northern Pacific Railroad Company, the predecessor of the Northern Pacific Railway Company.

The essential facts of the case, as they appear in the record, are that the plat of survey of this land was approved on March 30, 1916, and was filed in the local office on April 27, 1917; that on that day, at 9 a. m., the railway company filed place limits list No. 357 for the land above mentioned and other land, and the local officers allowed said list and forwarded the same to the General

Land Office; that later in the day Murray filed his homestead application above mentioned, accompanied by affidavit in which he stated that he had settled upon the land prior to January 1, 1913, in good faith, while it was unsurveyed, and was a qualified settler under the act of February 27, 1917 (39 Stat., 946). In his appeal to the General Land Office, Murray stated that he made settlement upon the land February 10, 1908, and thereafter had continued to comply with the law and regulations governing the making of homestead entries by settlers.

The road opposite the land here involved was definitely located on December 8, 1884, on which date, as well as on the date of the granting act (July 2, 1864), no one appears to have appropriated the land adversely to the railway company. There is no evidence indicating that the land is mineral in character.

In view of the showing made by Murray, the railway company was requested, by letter dated December 19, 1922, to relinquish this land in favor of Murray, and take other land in lieu thereof, in accordance with the provisions of the act of July 1, 1898 (30 Stat., 597, 620). Response was made on November 9, 1923, in which it was stated:

We regret to advise that after examination of the land the company feels obliged to decline to make such relinquishment. The company's examination shows that the improvements of the individuals are very slight, and that the land is not agricultural in character, but valuable for its timber.

The Commissioner thereupon revoked Washington Demand No. 453, made upon the railway company as aforesaid, as to the land here involved, leaving Murray free, however, to exercise his right under the act of February 27, 1917 (39 Stat., 946), permitting transfer of a claim of this character to other lands. See Circular No. 548 (46 L. D., 98).

In his appeal to the Department from the Commissioner's decision, Murray contends that the Northern Pacific Railway Company has no rights in the premises, as not being the legal successor to the Northern Pacific Railroad Company, holding that the latter was without authority to mortgage its land grant, and particularly unsurveyed lands. In numerous decisions, the Supreme Court has recognized the Northern Pacific Railway Company as the successor in interest of the Northern Pacific Railroad Company, and in the recent case of *United States v. Northern Pacific Railway Company* (256 U. S., 51, 58), Mr. Justice Van Devanter, in delivering the opinion of the court, used the following language:

The rights and obligations of the original railroad company arising out of the grant have long since passed to the present railway company and there is no need here for distinguishing one company from the other.

It seems, therefore, unnecessary to give this specification of error further consideration.

It is further contended by counsel for Murray, in the brief filed in support of the appeal, that under the terms of section 3 of the act of May 14, 1880 (21 Stat., 140), and the acts of July 1, 1898 (30 Stat., 597, 620), and February 27, 1917 (39 Stat., 946), a mandate is laid upon the Northern Pacific Railroad Company and its successors in interest, upon due application, to relinquish unsurveyed lands found upon survey to lie in odd-numbered sections within the limits of its primary grant, where settlement upon such lands has been made and maintained in ignorance of the fact that they fell within such sections. This question was given full and careful consideration when before the Department in the case of *Gilfeather v. Northern Pacific Ry. Co.* (43 L. D., 433), wherein it was held:

The case of *Humbird v. Avery* (195 U. S., 480), clearly defines the purpose for which the act of 1898 was passed, which was to facilitate the adjustment of controversies arising between the railway company and settlers through erroneous decisions and rulings of the Department.

Section 3 of the act of May 14, 1880 (21 Stat., 141), provides for making settlement upon the unsurveyed public lands of the United States. Uniformly, however, this act has been construed as prohibiting the settlement upon any lands which are reserved for any purpose by the Government, or to which adverse claims have attached prior to the initiation of the settlement. By the definite location of its line of road the right of the railroad company attached to the lands within its limits, as specified by the act of 1864.

\* \* \* \* \*

Considering the conditions which induced the passage of the act of 1898, it is manifest that Congress did not intend to alter or change the grant of 1864 in its entirety, but in connection with the grant to provide for a settlement of the contention arising out of the erroneous decisions of the Department, affording an equitable adjustment to both the settlers and the railway company. Had the act provided for the same adjustment of settlements made subsequent to said act upon the same terms and conditions as those made prior thereto, it would have been an invitation to the public to settle upon the unsurveyed lands within the grants of the road, with an absolute guarantee to the settler of protection and the carefully drawn distinction between settlements made prior to January 1, 1898, in the first section of the act, and settlements made subsequent thereto, provided for in the section hereinbefore quoted, would not have been made.

\* \* \* \* \*

The contention made by the plaintiff, in effect, that the act of 1864 was amended by the act of 1880, cannot be sustained. The well settled rule of statutory construction is that an act is not to be considered as repealed unless expressly so provided in the subsequent act, or the provisions of the subsequent act are in direct contravention of the former act, necessitating the implication that it was the intention of the legislative body to repeal the former act. If, however, a construction may be given the acts which carries into effect the purposes and provisions of each, then such construction must obtain. The construction heretofore placed upon the acts of 1864, 1880 and 1898 by the Department is believed to carry into full force and effect the provisions of each

of said acts, and the intention of Congress, signified by the language used therein.

The act of February 27, 1917, *supra*, was passed since the Gilfeather decision, quoted from above, was rendered. It, however, follows the act of July 1, 1898, in recognizing in the railway company a right to decline to relinquish or reconvey lands within its grant of the character of those here involved. See Instructions of April 28, 1917 (46 L. D., 98).

The prior decisions of the Department have been considered in the light of the elaborate brief filed by counsel for Murray, and the conclusion is reached that in them the law is correctly interpreted and applied. The decision appealed from, which follows these decisions, is accordingly hereby affirmed.

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**KENNETH G. MURRAY AND NORTHERN PACIFIC RAILWAY  
COMPANY.**

Motion for rehearing of departmental decision of May 17, 1924 (50 L. D., 539), denied by Assistant Secretary Goodwin, August 28, 1924.

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**RECLAMATION PROJECTS—RELIEF TO WATER USERS—EXTEN-  
SION ACT OF MAY 9, 1924.**

**REGULATIONS.**

**DEPARTMENT OF THE INTERIOR,**

**BUREAU OF RECLAMATION,**

*Washington, D. C., June 2, 1924.*

**TO ALL FIELD OFFICES:**

1. The following is the complete text of the relief act of May 9, 1924 (43 Stat., 116), entitled "An act To authorize the deferring of payments of reclamation charges":

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the Secretary of the Interior is hereby authorized and empowered, in his discretion, to defer the dates of payments of any charges, rentals, and penalties which have accrued prior to the 2d day of March, 1924, under the act of June 17, 1902 (Thirty-second Statutes at Large, page 388), and amendatory and supplemental acts or prior to that date, as against water users on any irrigation project being constructed or operated and maintained under the direction of the Commissioner of Indian Affairs, as may, in his judgment, be necessary in or concerning any irrigation project now existing under said act: *Provided*, That no payment shall be deferred under this section in any particular case beyond March 1, 1927: *Provided*, That upon such adjustment being made, any penalties or interest which may have accrued in connection with such unpaid construction and operation and maintenance charges shall be canceled and in lieu thereof the

amount so due, and the payment of which is hereby extended, shall draw interest at the rate of 5 per centum per annum, paid annually from the time said amount became due to date of payment: *And provided further*, That in case the principal and interest herein provided for are not paid in the manner and at the time provided by this section, any penalty now provided by law shall thereupon attach from the date of such default.

Sec. 2. That where an individual water user, or individual applicant for a water right under a Federal irrigation project constructed or being constructed under the act of June 17, 1902 (Thirty-second Statutes at Large, page 388), or any act amendatory thereof or supplementary thereto, makes application prior to January 1, 1925, alleging that he will be unable to make the payments as required in section 1 hereof, the Secretary of the Interior is hereby authorized, in his discretion prior to March 1, 1925, to add such accrued and unpaid charges to the construction charge of the land of such water user or applicant, and to distribute such accumulated charges equally over each of the subsequent years, beginning with the year 1925, or, in the discretion of the Secretary, distribute a total of one-fourth over the first half of the remaining years of the 20-year period beginning with the year 1925, and three-fourths over the second half of such period, so as to complete the payment during the remaining years of the 20-year period of payment of the original construction charge: *Provided*, That upon such adjustment being made any penalties or interest which may have accrued in connection with such unpaid construction and operation and maintenance charges shall be canceled and in lieu thereof the amount so due, and the payment of which is hereby extended, shall draw interest at the rate of 5 per centum per annum, paid annually from the time said amount became due to date of payment: *Provided further*, That the applicant for the extension shall first show to the satisfaction of the Secretary of the Interior detailed statement of his assets and liabilities and probable inability to make payment at the time required in section 1: *And provided further*, That in case the principal and interest herein provided for are not paid in the manner and at the time provided by this act, any penalty now provided by law shall thereupon attach from the date of such default: *And provided further*, That similar relief in whole or in part may be extended by the Secretary of the Interior to a legally organized group of water users of a project, upon presentation of a sufficient number of individual showings made in accordance with the foregoing proviso to satisfy the Secretary of the Interior that such extension is necessary.

2. *Scope of the Act.*—The act applies to all Federal irrigation projects constructed or being constructed under the reclamation law, and likewise to irrigation projects under the jurisdiction of the Commissioner of Indian Affairs. These regulations, however, apply only to the projects constructed or being constructed under the reclamation law. The act is a temporary relief measure and authorizes the Secretary to allow two kinds of time extensions on all reclamation charges due prior to March 2, 1924, to wit, (a) an extension of time on such charges for a period or periods not beyond March 1, 1927, hereafter referred to as relief under section 1 and (b) an extension of time where the water user is unable to make the payments as required in (a) by distributing such charges over the remaining construction instalments, hereafter referred to as relief under section 2.

3. *Relief under Section 1.*—Under this section the Secretary is authorized in his discretion to extend the date or dates of payment of any and all unpaid construction charges, operation and maintenance charges, and water rental charges due prior to March 2, 1924. No such charge can be extended beyond March 1, 1927, and all such charges extended, in lieu of any penalties now provided by law, will draw interest at the rate of 5 per centum per annum, paid annually from the time they originally became due and payable. If unpaid at the end of the extension period any and all penalties as provided by the reclamation law will attach from the date of such default.

4. *Relief under Section 2.*—In cases where the relief described in the preceding paragraph would be insufficient, the Secretary is authorized in his discretion under section 2 of said act to distribute the accrued and unpaid construction, operation and maintenance and water rental charges due prior to March 2, 1924, equally over each of the remaining construction instalments beginning with the year 1925 or to distribute one-fourth of such accrued charges over the first half of the remaining construction instalments and three-fourths over the second half of such instalments. All of such charges extended, in lieu of any penalty now provided by law will draw interest at the rate of 5 per centum per annum paid annually from the time said amount became due to date of payment, and in case of default in the payments as extended, any and all penalties now provided by law will attach from the date of such default.

5. *General Policy.*—Good policy and good faith both require that, so far as possible, repayments to the Government be not unreasonably postponed. Those water users who have credits and assets making it possible for them to pay all or part of their obligations due the United States will be expected to do so. At the same time, this measure will be applied sympathetically for the benefit of those not now able to pay but who are exerting themselves to reclaim their lands and to carry out their contracts with the United States. In this connection it becomes appropriate to give consideration to the report recently submitted by the Committee of Special Advisers on Reclamation. As a result of the recommendations contained in this report, and in furtherance thereof, a bill has been introduced and is now pending in Congress to authorize the Secretary to undertake a comprehensive and detailed survey of the physical and economic features of each reclamation project, and to provide for an equitable readjustment of all existing accounts. The proposed bill, if enacted into law, will result in the institution of a more scientific system of repayment, and pending its consideration by Congress, it is believed advisable to limit the administration of the present relief law to the extensions provided for in section 1 thereof. To that end, and during the present session of Congress, only relief

applications under section 1 will be considered. Those desiring to apply for long extensions, as provided for in section 2, will be afforded ample opportunity to do so at a date to be later announced and prior to the time limit as named in that section; that is, January 1, 1925.

6. *Procedure by Applicant.*—Every person who desires to obtain an extension under section 1 of this act must file a written request therefor in the office of the project chief clerk. The request must state the kind of charges owing; that is, construction, operation, and maintenance, or water rental, the length of the extension desired (limited, of course, by the provisions of the section to not beyond March 1, 1927), and briefly the condition and circumstances that make such extension necessary. No set form of application will be required as a basis for relief under this section, but the project chief clerk may find it advisable to prepare and distribute mimeographed copies of the three necessary requirements as stated above.

7. *Procedure by the United States.*—The board of directors of the local water users' association or irrigation district will be requested to take action on requests for relief. Following recommendations by such board the application will be considered by the chief clerk in connection with such data as are available in his office, notably other relief applications by the same party and data touching the general conditions of the unit in question and the division of the project involved, and render decision thereon either denying or allowing the relief sought. In cases where the chief clerk fully approves the request of the applicant, his decision shall be final; in all other cases the application shall be referred to the Director of Finance at Denver for consideration. In the absence of an appeal, decision of the Director will be final. Appeal will lie from the director's decisions to the commissioner and from the commissioner's decision to the Secretary of the Interior.

8. *Relief to Organized Group of Water Users.*—Extension of time may likewise be granted to a legally organized group of water users such as an irrigation district or a water users' association. Application for such extension must comply with the same requirements laid down for the individual and such application will be submitted with appropriate recommendations by the chief clerk through the Director of Finance to the commissioner for action.

ELWOOD MEAD,  
*Commissioner.*

Approved:

HUBERT WORK,

*Secretary.*

## PRACTICE APPLICABLE TO THE ISSUANCE OF OIL AND GAS PROSPECTING PERMITS AND EXTENSIONS OF TIME FOR COMPLIANCE WITH DRILLING REQUIREMENTS.

*Instructions, June 3, 1924.*

### OIL AND GAS LANDS—PROSPECTING PERMIT—STATUTES.

Section 13 of the act of February 25, 1920, is to be construed in connection with sections 14 and 17 of that act, and, when so construed, it is clear that the issuance of permits thereunder is contemplated only to encourage such prospecting as will bring into production a new field or to extend the known limits of a field already producing.

### OIL AND GAS LANDS—PROSPECTING PERMIT—LEASE.

Lands not covered by permit within the geologic structure of a newly proved oil and gas field, are not subject to prospecting under section 13 of the act of February 25, 1920, but should be offered for lease under section 17 of that act.

### OIL AND GAS LANDS—PROSPECTING PERMIT—LEASE.

One well drilled in an advantageous position upon a geologic structure covering a large area is usually a sufficient test, if successful, to warrant the definition of the entire structure as producing and subject to lease.

### OIL AND GAS LANDS—PROSPECTING PERMIT—LACHES—EXTENSIONS.

The Department can not sanction the granting of extensions of prospecting permits under the act of January 11, 1922, where permittees have idly awaited development by others with the expectation, upon the proving of the structure, to then secure drilling, and, upon discovery, claim a reward which was primarily intended for those proving the structure.

### OIL AND GAS LANDS—PROSPECTING PERMIT—RELINQUISHMENT—RESTORATIONS.

Where permits are canceled upon relinquishments or because of defaults of permittees, the lands covered thereby will not be restored to further disposal under the leasing act if test wells have been or are about to be drilled upon the geologic structure which includes those lands, pending the completion of the wells.

*First Assistant Secretary Finney to the Commissioner of the General Land Office:*

There are herewith the Department's decisions in the cases A. 6742 of Douglas S. Watson *v.* John C. Chaney *et al.*, and A. 6793 of Ervin S. Armstrong *v.* Edwin A. McKanna, in which the cancellations of oil and gas prospecting permits, heretofore issued to the appellants under section 13 of the leasing act of February 25, 1920 (41 Stat., 437), are affirmed.

These permits were issued for lands in the Kettleman Hills structure in California, and no substantial progress was made toward development until after the drilling of a test well by the General Petroleum Company elsewhere in the field was reported. Thereafter, belated efforts were made by the permittees to show diligence and good faith in the matter of complying with the drilling require-

ments of their permits. This the Department has just failed to recognize.

The situation disclosed by these records is one which appears to be common in a number of fields, and requires some modification of the present practice with respect to extensions of time and the issuance of permits.

Section 13 of the leasing act restricts the issuance of permits only to areas outside known geologic structures of producing oil and gas fields, but consideration of the remaining provisions of the act and its general purpose is convincing that there are much narrower limits outside of which permits may not properly be issued.

Comparison of the provisions of sections 13 and 14 and section 17 of the leasing act clearly indicates that the prospecting contemplated as necessary to entitle a permittee to a "reward for discovery" as provided in section 14 was primarily such prospecting as brought into production a new field or extended the known limits of a field already producing, and that the remaining land within the geologic structure of the newly proved field should be offered for lease under section 17 of said act in tracts of not to exceed 640 acres to the highest bidder, or in such other manner as was found to be to the best interests of the Government.

The area authorized to be leased under section 14, i. e. 2560 acres, was clearly intended to constitute an added inducement to insure prospecting operations in unproven territories, and not to indicate the largest area which could reasonably be tested by one well. On the contrary, the Department has long recognized that one well drilled in an advantageous position upon a geologic structure covering many times 2560 acres was a sufficient test, if successful, to warrant the definition of the entire structure as producing and subject to lease, and has also accepted evidence of substantial contributions to the cost of a single test well upon such a structure as diligence in compliance with the terms of prospecting permits sufficient to warrant extensions of time under the act of January 11, 1922 (42 Stat., 356).

The Department has been extremely liberal in the exercise of the discretion vested in it by the leasing act in the matter of issuing prospecting permits and in extending the time for compliance with the drilling requirements of permits; and has, by the instructions of April 23, 1921 (48 L. D., 98), given a mere application for permit, filed before a discovery of oil, for lands in the same structure, the same segregative effect as an issued permit, and insured to the applicant a right to a permit upon lands which, at the time of the issuance of the permit after delays incident to administration of the act, might have been demonstrated to be valuable for oil and gas by a discovery nearby. Such permittee thereby becomes entitled to a reward for discovery by a lease for one-fourth of the land in

the permitted area at a royalty of 5 per cent, and a preference right to lease the rest without paying any bonus therefor, although it was, at that time, practically certain that oil would be found, and, but for the segregating permit application or permit, the lands could have been leased at a higher royalty to the party offering the highest bonus therefor.

These liberal regulations have been made in order to encourage the prospecting of undeveloped areas; and, in many cases, as in the cases herewith, permits have issued and nothing has been done by the permittees, who evidently awaited development by others and hoped, upon the proving of the structure, to then secure drilling, and, upon discovery, claim a reward which was primarily intended for the persons proving the structure, and, in addition, to secure a lease of an enlarged area by virtue of preference rather than by competitive bidding for units of 640 acres.

The Department can not sanction such practices; but, in the exercise of the discretion vested in it by the leasing act, and in order to fulfill the plain purposes of such act and to conserve to the Government valuable rights, must cancel such permits, and withhold the land from further disposal pending the outcome of tests upon these structures, and, if oil or gas is discovered, hold the lands for lease as contemplated by section 17 of the leasing act.

While the interests of Watson and Armstrong are terminated and their permits canceled by the Department's decision, you will not cause the restoration of the land by notation of such cancellation in the local office, nor open it to the filing and drawing provided in instructions of April 23, 1924 (50 L. D., 387), until the outcome of the well now being drilled has been ascertained by the Department.

I have further to direct that such permittees, in this and other fields where drilling is progressing, as appear to be in default in the compliance with the drilling requirements of their permits be required to show compliance with the terms of said permits or such diligence as clearly warrants extensions of time, on penalty of the cancellation of such permits; and that such cancellations as are made shall not be followed by the opening of the land to further permit applications until it appears that the test well has failed to result in proving the land to be within a producing structure. If within such structure, the lands will, of course, be held for lease under section 17 of the leasing act.

In ascertaining whether wells are being drilled and the results of such tests, the assistance of the Geological Survey and the Bureau of Mines may be enlisted, and such arrangement made for securing this data as is mutually agreeable.

*Increased*  
*52 L.R. 339*  
**LELIA MAY SPRUILL.** - *Principle over ruled*  
*see 52 L.R. 339*  
*- see page 595*

*Decided June 9, 1924.*

**CULTIVATION—ENLARGED HOMESTEAD—STATUTES.**

The provision in the act of June 6, 1912, pertaining to the granting of relief from the area of cultivation required of homesteaders, does not confer the privilege of demanding as a matter of right that the relief be granted or mandatorily require the granting of such applications in any case or class of cases.

**CULTIVATION—ENLARGED HOMESTEAD—STOCK-RAISING HOMESTEAD.**

Where, at the time of entry under the enlarged homestead act, the land was subject to entry under both that act and the stock-raising homestead act, and was suitable only for grazing, the entryman is not entitled to equitable consideration in support of an application for reduction of the required area of cultivation.

*GOODWIN, Assistant Secretary:*

On October 15, 1920, Lelia May Fellom, now Spruill, made enlarged homestead entry, Santa Fe 040849, for the NE.  $\frac{1}{4}$ , E.  $\frac{1}{2}$  SE.  $\frac{1}{4}$ , Sec. 28, and W.  $\frac{1}{2}$  NW.  $\frac{1}{4}$ , Sec. 27, T. 7 N., R. 10 E., N. M. P. M., New Mexico, and at the same time as additional thereto made stock-raising homestead entry, Santa Fe 040850, for the E.  $\frac{1}{2}$  NW.  $\frac{1}{4}$ , Sec. 27, and SW.  $\frac{1}{4}$  and S.  $\frac{1}{2}$  NW.  $\frac{1}{4}$ , Sec. 22, same township and range.

On December 18, 1923, the entrywoman filed final proof under these entries which showed that the land covered by the enlarged homestead entry had not been cultivated but had been used for grazing only; and on the same day she presented her application for a total reduction in the area of cultivation on the ground that because of the drought, crops could not be profitably raised on the land. She stated that the lands have an altitude of 6100 feet above sea level, an average rainfall of 13 inches and ordinarily a temperature of from 32° to 85° F. during the cultivating season. In addition to this she made the following statement:

I had intended to cultivate the second year and thereafter as much as 40 acres but owing to drouth was forced to abandon the idea. The sandy nature of this land causes it to blow and drift in the wind and thereby destroys young plants. It is chiefly valuable for grazing purposes and to attempt to cultivate would destroy the chief value of the land. I therefore ask that my systematic grazing shown in my final proof be accepted in lieu of cultivation.

After noting the fact that the land covered by the enlarged homestead entry had been designated for entry under the stock-raising law in 1918, or more than two years before that entry was applied for, the General Land Office denied the application for reduction on the ground that—

Under circular of instructions of the Department dated February 1, 1924, a reduction in the required area of cultivation based on the physical condi-

tions of the land will not be permitted if at the date of the application to enter the land was designated and subject to entry under the stock-raising act.

In her appeal from that decision the entrywoman urges—

that said decision was and is in error, in that it makes a ruling of recent date retroactive and as taking effect upon her entry made and allowed October 15, 1920, at which time and for all of or practically all of the time between said entry and the date she offered final proof, a different construction was placed upon the law governing petitions for reduction of area of cultivation, and appellant cites the numerous instances wherein homesteaders upon lands designated under the act of December 29, 1916, were allowed total reduction in area of cultivation, that such construction was then placed upon said law and for a ruling made years after she filed to be held as affecting her entry seems manifestly unjust and beyond the intention of the Department in its dealing with settlers.

This contention as to the possible effect of a rule of *stare decisis* in this case need not be here considered because there are other and ample reasons which sustained the rejection of the application.

The law on which that application was based did not give this entrywoman the privilege of demanding as a matter of right that she be relieved from cultivation and it does not mandatorily require the granting of such applications in any case or class of cases. The statute does not say that the Secretary *must*, but that he "may upon a satisfactory showing, under rules and regulations prescribed by him reduce the area of cultivation, under homestead entries." Under that statute the Secretary may refuse to reduce the area in any particular case, or he may, as he did in cases of this kind, declare by regulations that reductions will not be allowed in stated classes of cases.

There are but few, if any, equitable considerations that can be urged in support of this application. When this entrywoman applied to enter this land under the enlarged homestead law she knew full well or should have known that the Secretary had declared that it was "chiefly valuable for grazing and the raising of forage crops," when he had theretofore designated it for entry under the stock-raising homestead law. When she made her entry she also knew or should have ascertained the character of the land, its sandy and shifting soil, its elevation and climatic conditions unfavorable to the growing of crops.

The entrywoman could have included all the land covered by both entries in her stock-raising entry and in that manner have relieved herself of all obligations to cultivate any part of it. But by doing so she would have abandoned all interest in any minerals that might possibly be discovered in the land and she would have assumed the obligation to expend \$1.25 per acre in improving the land. To avoid this as far as possible, she made the enlarged homestead entry, and in so doing tacitly promised to meet the require-

ments as to cultivation. Under such circumstances the Secretary of the Interior is fully justified in refusing to exercise his discretionary power by excusing cultivation.

The decision appealed from does not deal harshly with this entrywoman and reject her final proof but it on the contrary extends to her the privilege now to change her enlarged homestead entry to a stock-raising entry and in that manner make the acceptance of the showings in her proof possible.

For these reasons the decision appealed from is hereby affirmed.

### ENROLLMENT OF CHILDREN BORN OF A MARRIAGE OF A WHITE MAN AND AN INDIAN WOMAN.

*Opinion, June 16, 1924.*

#### MENOMINEE INDIANS—MARRIAGE—DESCENT AND DISTRIBUTION—STATUTES.

The act of June 7, 1897, does not entitle the children born of a marriage solemnized between a white man and an Indian woman to enrollment and to share in the distribution of tribal property, unless their mother had been recognized by the tribe as belonging thereto, and, in this respect, the act did not contemplate a forced recognition without the consent of the tribe.

#### COURT AND DEPARTMENTAL DECISIONS CITED AND APPLIED.

Cases of *Oakes v. United States* (172 Fed., 305), and *William Banks* (26 L. D., 71), cited and applied.

#### EDWARDS, *Solicitor*:

My opinion is requested in the matter of the enrollment of Addie Prickett, Laura McNutt, Frank Wilbur, Amos Wilbur, George Wilbur and David Wilbur with the Menominee Tribe of Indians, Wisconsin.

Applications of the above persons for enrollment with the Menominee Tribe were denied by the Department March 1, 1907, and September 27, 1910. Request has been made for reconsideration of that action based on an act apparently not considered at the time. The persons in question are the children of Sarah Wilbur, a Menominee Indian of mixed blood, who was the wife of a white man and whose enrollment was authorized in said decision of the Department of March 1, 1907. In the request for reconsideration reference is made to the act of June 7, 1897 (30 Stat., 62, 90), providing for the enrollment under certain conditions of children born of a marriage theretofore solemnized between a white man and an Indian woman. It is alleged that error was committed in holding that because the mother, Sarah Wilbur, was not recognized as a member of the tribe prior to March 1, 1907, the act of June 7, 1897, does not apply as "there is not a word about membership in the act,

nor place of birth, affiliation or other matter, and the Department can not legislate."

It appears that Sarah Wilbur had 14 children and that she originally applied for enrollment of herself and all of her children, 11 of whom were born off the reservation and 3 alleged to have been born on the reservation. Her application was subsequently modified to include only the 3 children alleged to have been born on the reservation. The tribe voted unanimously against the enrollment of both Sarah Wilbur and all of her children. The Department, however, on March 1, 1907, authorized the enrollment of the mother, at the same time denying the application for the children. This was upon the showing, among other things, that the mother of Sarah Wilbur was at one time carried on the rolls as a half-breed Menominee Indian and that Sarah Wilbur had removed to and was then living on the reservation. Application for the enrollment of the children was renewed in 1909 including those named in the present request for reconsideration. The tribe unanimously opposed the enrollment of any of the applicants, all of whom were born off the reservation and had never affiliated with or been recognized by the tribe. The Department on September 27, 1910, authorized the enrollment of two of said applicants on the ground that they were married to enrolled members of the tribe and had for many years been affiliated therewith and residing on the reservation, but denied the application of the other children. It appears to have been the custom of the Indians at the time to recognize intermarried women as belonging to the tribe and entitled to share in its benefits. Two other children of Sarah Wilbur were for like reasons subsequently enrolled with the tribe.

As above stated the present request for reconsideration is based solely on the act of June 7, 1897, *supra*, which reads as follows:

That all children born of a marriage heretofore solemnized between a white man and an Indian woman by blood and not by adoption, where said Indian woman is at this time or was at the time of her death, recognized by the tribe shall have the same rights and privileges to the property of the tribe to which the mother belongs, or belonged at the time of her death, by blood, as any other member of the tribe; and no prior act of Congress shall be construed as to debar such child of such right.

The contention is that as these applicants are the children of a white man and an Indian woman by blood and not by adoption, "belonging to the Menominee Tribe of Indians by blood," and that as the mother was commonly known among, and "recognized by the tribe on and prior to June 7, 1897," and is now enrolled, they are within the provisions of said act regardless of membership in the tribe, place of birth, affiliation or other matter.

The act of June 7, 1897, was not referred to and apparently was not considered in connection with the departmental actions of

March 1, 1907, and September 27, 1910, enrolling Sarah Wilbur and denying such right to her children. It is true that the persons contemplated by the remedial act of June 7, 1897, do not have to show enrolled membership in order to share in the distribution of the property of the tribe. It was held in an opinion of the Assistant Attorney General of this Department in the case of William Banks (26 L. D., 71, 73):

The object of that act was not to make the persons coming within its provisions members of any tribe of Indians nor to reinstate them where they had withdrawn from such membership but to confer upon them simply one of the incidents of membership; that is, a right to share in the distribution of the property of the tribe.

But in order to entitle such children as are referred to in said act to a right to share in the tribal property, it must be shown as expressly required in said act, that the mother was recognized as a member of the tribe. The statement in the request for reconsideration that the mother, Sarah Wilbur, was recognized by the tribe on and prior to the act of June 7, 1897, is not borne out by the evidence, especially in view of the persistent objections of the tribe to her enrollment. In view of all the facts it is not believed the statement can mean more than that the relatives and acquaintances of Sarah Wilbur recognized that she possessed Menominee blood through her mother who was at one time recognized by the tribe. The fact is that Sarah Wilbur did not apply for enrollment until long after the passage of said act, although her marriage took place prior thereto and she was not actually enrolled until March 1, 1907, which was then done over the protest of the tribe and solely on the ground that her mother was at one time carried on the rolls and that she herself had returned to the reservation. Aside from the facts, which do not clearly establish recognition by the tribe, a forced recognition is not such recognition as is evidently contemplated by the act of June 7, 1897. The authorities fully recognize the right of the several Indian tribes to regulate their internal affairs, including determination of who are the tribal members, subject only to the power of Congress to annul their customs, usages and determinations.

In an opinion (unreported) of the Assistant Attorney General for this Department, under date of March 14, 1905, after fully setting forth the history of the act of June 7, 1897, it was held among other things:

\* \* \* where an Indian woman is after intermarriage with a white man recognized by her tribe as belonging thereto, and the family so founded identifies itself and affiliates with the Indian tribe to which the mother belonged and by which she continued to be recognized, and the issue of such marriage are recognized by tribal usage as its members, such issue are entitled to be

enrolled in the tribe and to receive the benefit of tribal annuities and property \* \* \*.

It was concluded in said opinion that the construction of the act of 1897 given by the instructions of March 5, 1904 (unpublished), in the matter of the New York Indians is the correct one and should be followed. Those instructions read in part:

The act was clearly aimed at a supposed injustice in the administration of Indian affairs. It must be construed to relieve the issue of a marriage coming within its descriptive terms. It applies to all prior marriages, for the word "heretofore" clearly requires it, and the words "is at this time or was at the time of her death" necessarily so imply. The descriptive words "is at this time or was at the time of her death" also necessarily imply a continuance of tribal relation and of identification with the Indian community after the marriage, and can not apply where the woman by her marriage in effect withdrew from the tribe, no longer identified herself with the tribal community and interests, \* \* \*.

The act is remedial, intended to save rights, and is supplementary to the act of 1888, and should be construed to operate in favor of offspring of all marriages wherein the rights of the mother are saved by that act, if the family has continued to be identified with the Indian community.

The opinion of the Assistant Attorney General of March 14, 1905, *supra*, in construing the act of June 7, 1897, evidently went too far in holding "and the issue of such marriage are recognized by tribal usage as its members," as said act clearly does not impose any such condition upon the persons coming within its provisions. In this respect the opinion is really broader than the instructions in the matter of the New York Indians which it adopts. Under the terms of the act to entitle children born of a marriage between a white man and an Indian woman to rights and privileges in the mother's tribe it must appear that she is recognized by the tribe as belonging thereto, but no such requirement is laid upon the children themselves. The scope of the act is properly set out in the case of William Banks, *supra*. This view, however, is not helpful to the present applicants as their mother was not only born apart from the tribe but did not live therewith nor has she been recognized by the tribe as one of its members.

[While the Department may as a general thing direct, as was done in the case of Sarah Wilbur, enrollments over tribal protests where it deems such course proper in the interest of justice, yet when it comes to determining rights under the act of June 7, 1897, wherein the conditions under which children born of a marriage between a white man and an Indian woman are permitted to share in tribal property are expressly prescribed, not only is the Department bound by the rule thus established but the tribe itself is powerless to object.] Under that rule to entitle the children of Sarah Wilbur to rights and privileges in the Menominee Tribe, it must be clearly shown

that the mother was recognized by the tribe as belonging thereto. Not only that, but the mother, Sarah Wilbur, was living at the time the act of June 7, 1897, was passed and was not then recognized by the tribe as contemplated by said act. It was held in the case of *Oakes v. United States* (172 Fed., 305), which affirmed the case of *William Banks, supra* (syllabus) :

Act June 7, 1897, c. 3, 30 Stat., 62, relating to the rights of children of a white man and an Indian woman in tribal property, does not embrace the children of a mother who was living at the time of its passage and was not then recognized by the tribe as one of its members.

Furthermore, the facts of this case are similar to those in the case of *Oakes v. United States, supra*. Sarah Wilbur occupies a similar position to that of Mrs. Jones in that case, and her children are in the same position as Mrs. Andrews and Mrs. Bent, the children of Mrs. Jones. The act of June 7, 1897, was invoked in support of the claims of Mrs. Andrews and Mrs. Bent. The court held, however (page 310) :

But of this act it is enough to say that its terms are such that it does not embrace the children of a mother, such as Mrs. Jones, who was living at the time of its passage and was not then recognized by the tribe as one of its members.

The facts in the case of *Vezina v. United States* (245 Fed., 411), are also similar to those in the case of Sarah Wilbur, except that Mrs. Delaney, the mother of Mrs. Vezina, was not living at the time the court rendered its decision. Reference was made in that case to the act of June 7, 1897, as to which the court said (page 420) :

\* \* \* Under this statute Mrs. Vezina is clearly entitled to be recognized and treated in all respects as if she had remained upon the reservation. It is true that, if Mrs. Delaney was now living, under our decision in *Oakes v. United States*, 97 C. C. A. 139, 172 Fed. 305, Mrs. Vezina would not be entitled to be enrolled under this statute. That decision would probably exclude the children of Mrs. Vezina from the right to enrollment and from allotment. As there is no case before us now, except the case of Mrs. Vezina, we do not care to express a more definite opinion upon the question of her children.

That the persons coming within the provisions of said act of June 7, 1897, have no inherent right in tribal property even though possessing a quantum of Indian blood is clearly indicated by the fact that legislation was deemed necessary to confer rights upon such persons. No claim is made that the applicants herein were ever identified with or recognized by the tribe, but their claim is apparently based on the fact of their Indian blood, and perchance the enrollment of their mother. This is not sufficient either under the law or the decisions. There is no question that a parent may be entitled to enrollment while the child is not.

No valid reason is seen for disturbing the action heretofore taken by the Department in denying the applications of the persons named in the request for reconsideration.

Approved:

F. M. GOODWIN,

*Assistant Secretary.*

**MINING REGULATIONS—PARAGRAPH 89, CIRCULAR NO. 430 (49 L. D., 15), AMENDED.**

**INSTRUCTIONS.**

[Circular No. 943.]

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

*Washington, D. C., June 18, 1924.*

**REGISTERS AND RECEIVERS,**

**UNITED STATES LAND OFFICES:**

Paragraph 89 of the circular of April 11, 1922 (49 L. D., 15), is hereby amended so as to read:

(1) The charge for the publication of notice of application for patent in a mining case in all districts shall not exceed the legal rates allowed by the laws of the State for the publication of legal notices wherein the notice is published, and in no case shall the charge exceed \$10. for each ten lines of space occupied where publication is had in a daily newspaper, and where a weekly newspaper is used as a medium of publication, \$7.50 shall be the maximum charge for the same space. Such charge shall be accepted as full payment for publication in each issue of the newspaper for the entire period required by law.

It is expected that these notices shall not be so abbreviated as to curtail the description essential to a perfect notice, and on the other hand that they shall not be of unnecessary length. The printed matter must be set solid without paragraphing or any display in the heading and shall be in the usual body type used in legal notices. If other type is used, no allowance will be made for additional space on that account. The number of solid lines only used in advertising by actual count will be allowed. All abbreviations and copy must be strictly followed. The following is a sample of advertisement set up in accordance with Government requirements and contains all the essential data necessary for publication:

M. A. No. 04421, U. S. Land Office, Elko, Nevada, October 5, 1921. Notice is hereby given that the Jarbidge Buhl Mining Company by W. H. Hudson, attorney in fact, of Jarbidge, Nevada, has made application for patent to the Altitude, Altitude No. 1, Altitude No. 3, and Altitude Annex, lode mining

claims, Survey No. 4470, in unsurveyed T. 46 N., R. 58 E., M. D. B. and M., in Jarbidge mining district, Elko County, Nevada, described as follows: Beginning at corner No. 1, Altitude No. 3, whence the quarter corner of the south boundary of Sec. 34, T. 46 N., R. 58 E., M. D. B. and M., bears south  $41^{\circ} 54'$  west 7285.63 feet, thence north  $20^{\circ} 14'$  west 1500 feet to corner No. 2 of said lode; thence north  $69^{\circ} 46'$  east 569 feet to corner No. 3 of said lode; thence south  $20^{\circ} 14'$  east 417.5 feet to corner 2, Altitude No. 1; thence north  $69^{\circ} 46'$  east 1606.1 feet to corner No. 3, Altitude lode; thence south  $20^{\circ} 14'$  east 1500 feet, to corner No. 4 of said lode; thence south  $69^{\circ} 46'$  west 1606.1 feet, to corner No. 1, Altitude No. 1 lode; thence north  $20^{\circ} 14'$  west 417.5 feet to corner No. 4, Altitude No. 3; thence south  $69^{\circ} 46'$  west 569 feet to point of beginning. There are no adjoining or conflicting claims. The location notices are recorded in Book 17, pages 373 and 374, and in Book 15, pages 52 and 53, mining locations, Elko County, Nevada, John E. Robbins, Register.

(2) For the publication of citations in contests or hearings, involving the character of lands, the charges may not exceed the rates provided for similar notices by the law of the State, and shall not exceed \$12 for five publications in a weekly newspaper, or \$15 for publication in a daily newspaper for thirty days. Such charge shall be accepted as full payment for all the matter so published and for the full period required.

WILLIAM SPRY,  
*Commissioner.*

Approved:

E. C. FINNEY,  
*First Assistant Secretary.*

## EXTENSION OF TIME FOR PAYMENTS—FORT BERTHOLD INDIAN RESERVATION.

### INSTRUCTIONS.

[Circular No. 944.]

DEPARTMENT OF THE INTERIOR.

GENERAL LAND OFFICE,

Washington, D. C., June 19, 1924.

REGISTER AND RECEIVER,

BISMARCK, NORTH DAKOTA:

The act of May 24, 1924 (43 Stat., 139), provides—

That any homestead entryman or purchaser of Government lands within the Fort Berthold Indian Reservation in North Dakota who is unable to make payment of purchase money due under his entry or contract of purchase as required by existing law or regulations, on application duly verified showing that he is unable to make payment as required, shall be granted an extension to the 1925 anniversary of the date of his entry or contract of purchase upon payment of interest in advance at the rate of 5 per centum per annum on the amounts due from the maturity thereof to the said anniversary; and if at the expiration of the extended period the entryman or

purchaser is still unable to make the payment he may, upon the same terms and conditions, in the discretion of the Secretary of the Interior, be granted such further extensions of time, not exceeding a period of three years, as the facts warrant.

The act applies both to entries made under the act of June 1, 1910 (36 Stat., 455), and those made under the act of August 3, 1914 (38 Stat., 681).

*Previous requirements in the matter of payments.*—The provisions of the act of June 1, 1910, were specifically extended to lands to be opened under the act of August 3, 1914. The said act of June 1, 1910, provides that one-fifth of the purchase price shall be paid at the time of entry and the balance in five equal annual installments commencing two years from the date of entry. Section 1 of the act of May 28, 1914 (38 Stat., 383), authorizes an extension of time for one year for the payment of any annual installment upon the payment of the interest in advance at the rate of 5 per cent per annum on the amounts so extended and that any payment so extended may annually thereafter be extended in like manner provided that all payments are completed within a period not exceeding one year after the last payment becomes due under the act under which the entry was made. Accordingly the utmost time allowed for completion of payments on entries made under the act of June 1, 1910, or under the act of August 3, 1914, was seven years from the date of entry.

The said act of May 24, 1924, modifies the above requirements in the following respects:

On those entries on which the 7-year period for payment allowed under the acts cited above expires prior to the 1925 anniversary thereof, an extension of time may be obtained to said anniversary upon the filing of an application duly verified, accompanied by payment of interest in advance on the amounts due from the maturity thereof to the 1925 anniversary of the dates of the entries at the rate of 5 per cent per annum. If at the expiration of the extended period entryman is still unable to make the required payment, further extensions may be obtained from year to year in the same manner, but no extension will be granted beyond a period of three years from the 1925 anniversary of the date of the entry.

You are directed to serve notice on each entryman who is in default in the matter of payments either of principal or interest that if the required sums are not paid or an extension of time obtained as herein provided within 30 days from receipt of notice hereof, you will report his entry to this office for cancellation.

WILLIAM SPRY,  
*Commissioner.*

Approved:

E. C. FINNEY,  
*First Assistant Secretary.*

## JURISDICTION OVER DISPOSAL OF LANDS WITHIN ABANDONED MILITARY AND LIGHTHOUSE RESERVATIONS.

*Instructions, June 21, 1924.*

### ABANDONED MILITARY RESERVATION—LIGHTHOUSE RESERVATION—JURISDICTION.

Where Congress has by separate acts conferred specific jurisdiction upon the Department of the Interior and the Department of Commerce respectively to dispose of public lands within abandoned military and lighthouse reservations, the former Department, having assumed jurisdiction with the consent of the latter, may, under its coordinate authority, dispose of lands which were formerly within both a military reservation and a lighthouse reservation.

### OPINION OF ATTORNEY GENERAL CITED AND DISTINGUISHED.

Opinion of Attorney General (32 Ops. Att. Gen., 486), cited and distinguished.

### FINNEY, *First Assistant Secretary*:

By letter of May 14, 1924, in pursuance of your [Commissioner of the General Land Office] recommendation of April 29, 1924, the Department directed the survey, appraisal, and disposal under the act of July 5, 1884 (23 Stat., 103), of certain small tracts in Secs. 20 and 28, T. 54 S., R. 42 E., Florida, which were considered subject to disposal under the said act as a portion of an abandoned military reservation.

I now have your letter of June 14, 1924, wherein certain questions are presented as to the propriety of disposing of the tracts as abandoned military reservation lands in view of the fact that they were also formerly embraced in a lighthouse reservation.

It appears that the said lands with others were reserved by Executive order of August 28, 1847, for lighthouse purposes, and by Executive order of February 11, 1897, they were reserved for military purposes.

By Executive order of April 28, 1916, the lands were declared useless for military purposes and were placed under the control of this Department for disposal under the said act of July 5, 1884.

Under date of May 8, 1916, the Department of Commerce stated that these lands were not needed for lighthouse purposes and requested that they be restored to the public domain.

By act of Congress of March 2, 1917 (39 Stat., 995), a patent which had erroneously issued to the State of Florida for some of the reserved lands was confirmed, and the State was also allowed to select the swamp lands to the same extent as if the reservations had never existed. That act expressly recognized the said reservations as abandoned and relinquished. In view of this record I think it may be quite conclusively deduced that the lighthouse reservation is nonexistent. It has been abandoned by the executive department

having jurisdiction over that branch of the service, and the abandonment has been recognized by Congress in the enactment of legislation inconsistent with any theory that the reservation continues in force.

Thus, the lands constitute a portion of an abandoned lighthouse reservation and also an abandoned military reservation. There are separate special acts of Congress for the disposal of each of these two classes of lands.

It is true that the Attorney General in his opinion of March 29, 1921 (32 Ops. Atty. Gen., 488), held that the Department of Commerce is authorized to dispose of abandoned lighthouse sites under the act of March 4, 1913 (37 Stat., 1017), and that where Congress has provided a particular method for disposal of a certain class of lands no other method may be employed. In this case, however, the act of July 5, 1884, *supra*, is just as specific and definite in conferring jurisdiction upon this Department to dispose of abandoned military reservation lands in a particular manner, and the President has turned these lands over to this Department for that purpose. Furthermore, the Department of Commerce is not claiming jurisdiction, but has signified its desire to leave the disposal of these lands to the jurisdiction of this Department.

Having assumed jurisdiction under its coordinate authority it seems altogether appropriate that this Department should proceed in accordance with prior instructions. This procedure seems to be decidedly preferable in the instant case, viewed from the standpoint of administrative exigency, especially as the lands would in any case have to be surveyed by this Department prior to disposal.

You will therefore proceed accordingly.

*Dec 48 LAD 135*  
**FRED S. EIDMANN.**

*Decided June 23, 1924.*

**DESERT LAND—ENLARGED HOMESTEAD—ACT OF FEBRUARY 27, 1917.**

The act of February 27, 1917, which extended the act of August 30, 1890, by permitting one who has made an enlarged homestead entry for 320 acres, to make a desert-land entry for 160 acres, does not authorize the allowance of any entry under the desert-land law in favor of one who has entered and perfected title to, or is holding an entry or entries of more than 320 acres of agricultural land.

**PRIOR DEPARTMENTAL DECISION ADHERED TO.**

Case of Marshall F. Hopper (41 L. D., 283), adhered to.

**FINNEY, First Assistant Secretary:**

This is an appeal by Fred S. Eidmann from a decision by the Commissioner of the General Land Office dated March 22, 1924, hold-

ing his desert-land application, filed November 23, 1922, for the NW. ¼, Sec. 12, T. 27 N., R. 23 E., M. M., within the Glasgow, Montana, land district, for rejection on the ground that no source of water furnishing an adequate supply for irrigation of the land was shown.

It is needless to discuss the Commissioner's ground of rejection and the appeal, because the applicant showed himself disqualified from the very first to make a desert-land, or any other agricultural public-land entry.

In his application he stated—

\* \* \* that since August 30, 1890, I have not entered and acquired title to, nor am I now claiming, under an entry made under any of the nonmineral public-land laws, an amount of land which, together with the land now applied for, will exceed in the aggregate 800 acres. \* \* \*

Evidently the local officers and the Commissioner overlooked that statement on the part of the applicant. The records of the General Land Office show that Frederick, or Fred, S. Eidmann held 640 acres under the enlarged and stock-raising homestead laws in Secs. 27, 28, 33, and 34, T. 26 N., R. 31 E., M. M., on November 23, 1922, when this application was filed. His enlarged homestead entry for 320 acres was patented to him on March 27, 1922. His stock-raising homestead entry for 320 acres was made December 5, 1921, and is still intact of record.

In the case of Marshall F. Hopper (41 L. D., 283), this Department held (syllabus):

The provision in the act of August 30, 1890, limiting the amount of land that may be acquired by one person under the agricultural public-land laws to 320 acres, will prevent one who has of record an entry made under the enlarged homestead act for 320 acres, or its equivalent, from making entry under the desert-land law.

While it is true that under the act of February 27, 1917 (39 Stat., 946), a person who has made an enlarged homestead entry for 320 acres is now qualified to make a desert-land entry for 160 acres, the law as stated in the case cited has not otherwise been changed. There is no authority for allowing a person who has entered and perfected title to, or is now holding an entry or entries of, more than 320 acres of agricultural land to make any entry under the desert-land law.

The decision appealed from is affirmed for the reason stated.

## WILLIAM J. O'HAIRE.

*Instructions, June 23, 1924.*

## OIL AND GAS LANDS—PROSPECTING PERMIT—LEASE—CONTIGUITY—WORDS AND PHRASES.

The term "shall be in compact form," as used in section 14 of the act of February 25, 1920, in connection with the granting of a five per cent royalty lease thereunder, does not require that the leased lands be contiguous in all cases, but contemplates that a permittee may, where in-contiguous tracts have been included in a prospecting permit, select as a reward for discovery, the legal subdivision upon which the discovery well is located, and such remaining land, as near thereto as is possible, up to the prescribed amount, whether contiguous or noncontiguous.

FINNEY, *First Assistant Secretary*:

I am returning without approval your [Commissioner of the General Land Office] proposed letter to the register and receiver, Great Falls, Montana, in which William J. O'Haire is required to amend his application for a lease under section 14 of the general leasing act so as to include contiguous tracts.

A prospecting permit, Great Falls 052549, issued to O'Haire under section 13 of the leasing act, was for the W.  $\frac{1}{2}$  E.  $\frac{1}{4}$ , Sec. 17, NW.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ , Sec. 20, T. 35 N., R. 36 E., and the E.  $\frac{1}{2}$  SE.  $\frac{1}{4}$ , Sec. 35, T. 36 N., R. 2 W., M. M., and after making a discovery of oil upon the SE.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , Sec. 35, the permittee asked for a lease at a royalty of 5 per cent as reward for such discovery upon the E.  $\frac{1}{2}$  SE.  $\frac{1}{4}$ , Sec. 35, T. 36 N., R. 2 W., and SW.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , Sec. 17, NW.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ , Sec. 20, T. 35 N., R. 2 W.

In your letter it is proposed to require him to take a lease at 5 per cent royalty for 160 acres of the contiguous lands in T. 35 N., R. 2 W., or in the alternative, to accept such lease for 80 acres only including the discovery well. This action is stated to be necessitated by the provisions in section 14 of the act that the area to be selected and applied for at a royalty of 5 per cent "shall be in compact form."

The action proposed is contrary to the expressed provision of section 14 of the act in so far as it proposes to cut the area to 80 acres, if the discovery well is to be included. That section expressly provides, "That the permittee shall be granted a lease for as much as one hundred and sixty acres of said lands, if there be that number of acres within the permit."

The words "shall be in compact form" relied upon in your letter, standing alone might warrant the interpretation given therein. They must, however, be construed in the light of the rest of the section and the act as a whole.

There is no expressed requirement that the permittee be allowed to include the land on which the discovery well is located in the area sought as a reward for such discovery. However such a right is inherent in the idea of a reward for discovery, and is necessary to make such reward valuable for the permittee is only entitled to a preference right to lease the remaining lands upon such terms as the Secretary may provide. If, as in the present case, only a very limited area could be secured in a favorable location on a structure and the permittee could not safely secure an enlarged area near by without danger of losing a lease for his well by being required to take contiguous lands in a less favorable location at the lower royalty and to meet such terms as might be prescribed for the area with the well, few persons or corporations would be warranted in making the expenditures and assuming the risks attendant upon the drilling of wells in unproven fields. Such a result would be contrary to the expressed purpose of the leasing act which is to *encourage* prospecting and development of unproven fields.

Section 13 of the leasing act authorizes the issuance of permits for lands in a "reasonably compact form" and the Department has construed that to mean incontiguous areas within a general area six miles square where, because of prior disposals, a reasonable area of contiguous lands can not be secured. Having granted permits for such incontiguous areas, the Department is under a legal duty to issue a lease for one-fourth the area, or for at least 160 acres if the permit covers that area, upon discovery by the permittee, and can only, therefore, require that the area selected be in a reasonably compact form. Any area sought at a royalty of 5 per cent which includes the discovery well and such lands as are as near thereto as possible is reasonably compact and should be so recognized.

In the instant case the permittee should only be required to amend his application to include the W.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , Sec. 17, in lieu of the lands selected in sections 17 and 20, or allowed, in the alternative, to select the entire 160 acres from contiguous 40-acre tracts in said sections.

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### BENJAMIN HENNAGAN.

*Decided June 25, 1924.*

#### HOMESTEAD ENTRY—ENLARGED HOMESTEAD—COMMUNITY PROPERTY—RESIDENCE—STATUTES.

An original homestead entry which has become the community property of the entryman and his wife, although the legal title is in the name of the latter, is still owned by the entryman within the intent of section 7 of the enlarged homestead act.

FINNEY, *First Assistant Secretary*:

This is an appeal by Benjamin Hennagan from a decision of the Commissioner of the General Land Office dated March 20, 1924, holding for cancellation his entry made December 6, 1916, under section 7 of the enlarged homestead act for N.  $\frac{1}{2}$  SW.  $\frac{1}{4}$  SW.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , Sec. 1, and SE.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , Sec. 2, T. 16 S., R. 9 E., M. D. M., San Francisco, California, land district, as additional to his entry under section 2289, Revised Statutes, for S.  $\frac{1}{2}$  SW.  $\frac{1}{4}$ , NW.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , SW.  $\frac{1}{4}$  NW.  $\frac{1}{4}$ , Sec. 27, T. 15 S., R. 9 E., M. D. M.

Final proof on the additional entry was submitted January 25, 1923, but final certificate was withheld at the request of the chief of field division. On the recommendation of a special agent, proceedings were instituted against the entry on the charges—

1. That claimant has not established and maintained a residence on the additional entry.

2. That claimant is not entitled to apply the residence maintained on the original entry as residence to perfect the additional entry, for the reason that he did not own the land embraced in the original entry on the date the additional was filed, nor has he, since filing the additional entry, acquired title thereto.

In his answer entryman admitted that he had not resided on the additional entry, but stated that the original entry was community property, the title being in the name of his wife.

The case was submitted on an agreed statement of facts, as follows:

It is agreed that the facts as to certain features of the Ben Hennagan homestead, serial 010052, San Francisco, are as follows:

Date of entry, December 6, 1916.

Date of final proof, January 25, 1923.

March 3, 1910, mortgage, Ben Hennagan and Clara E. Hennagan, his wife, to Savings & Loan Bank of San Benito County, Hollister, Calif., on original homestead, Sec. 27, T. 15 S., R. 9 E., and other lands. Security for promissory note, \$3,795, @ 6% V. 36, page 168, Mortgages.

August 2, 1911, judgment in favor of plaintiff, John Oliver, v. Ben Hennagan, \$2,998.03.

November 8, 1913, certificate, Maude Towle, Commissioner of Superior Court, San Benito, as to sale of original homestead and other lands to Savings and Loan Bank of San Benito County, pursuant to order of sale and decree of foreclosure, Superior Court, in case of Savings and Loan Bank of San Benito County v. Ben Hennagan, Clara E. Hennagan, and John Oliver, defendants. Decree, September 29, 1913, \$5,555.77, and \$91.00 costs. Sold at public auction for \$5,646.77. V. 1, Certificates of sale, page 307, San Benito County.

December 2, 1914, Deed, Savings & Loan Bank of San Benito County to Clara E. Hennagan, \$5,835.00 V. 54, page 111 of Deeds.

December 2, 1914, Mortgage, Clara E. Hennagan and Ben Hennagan to Savings & Loan Bank of San Benito County, security for promissory note, \$4,000. V. 44, page 204, Mortgages. Assigned Bank of Italy December 29, 1916. Satisfied in full August 28, 1919.

December 2, 1914, mortgage, Clara E. Hennagan and Ben Hennagan to James Hennagan: Security for promissory note, \$885.00, subject to bank mortgage. V. 44, page 209, Mortgages. Since satisfied in full.

April 10, 1917, trust deed, Clara E. Hennagan and Ben Hennagan to Bank and Trust Co., of Central Calif., Fresno, trustee, and Minnie M. Waite and Ira E. Waite, beneficiaries, security, promissory note, \$784. V. 4, page 213, Trust Deeds: Reconveyance May 23, 1919. V. 62, page 15, Deeds.

June 30, 1919, Mortgage, Clara E. Hennagan and Ben Hennagan to Bank of Italy, Hollister Branch, successors of Savings and Loan Bank of San Benito County, security for promissory note, \$2,234.00. V. 52, page 207, Mortgages.

Original homestead and other lands embraced in various deeds and mortgages assessed since the year 1914 to Clara E. Hennagan on records of county assessor, San Benito County.

Further it is admitted by Ben Hennagan that he did not reside at any time on this additional 010052. It is admitted by all parties hereto, that said Ben Hennagan and his wife have lived continuously for the past twenty years on the land embraced in F. C. 9017—7/22/07, to wit: S.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , NW.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , SW.  $\frac{1}{4}$  NW.  $\frac{1}{4}$ , Sec. 27, T. 15 S., R. 9 E., MDM, except during the greater portion of the year 1919, when he and his wife were away at Pittsburg and San Francisco, and during 1920 and 1921, when Ben Hennagan was away and his wife resided on the original entry. Admitted that said Ben Hennagan has through his own earnings paid the interest on the aforementioned loans and has repaid part of the principal loan. Further that said Ben Hennagan has never deeded any part or portion of his original homestead to anyone. That he was deprived of the original title by court order and due process of law. That all mortgages affecting said land were jointly signed by Ben Hennagan and Clara Hennagan, his wife.

Agreed that the above statement of facts may be submitted and filed in lieu of any further testimony in this contest, and may serve in lieu of appearance at any time the hearing may be set on the contest matter and that no default will be entered against either party hereto after the filing of this stipulation.

Defendant reserves the right to file a brief on points of community property law and contestant reserves the right to file a reply brief thereto.

On November 14, 1923, there was filed an affidavit by the wife of entryman as follows:

That the deed of December 2, 1914, Savings & Loan Bank of San Benito County to Clara E. Hennagan, was accepted and considered by me as community property. That all subsequent conveyances and mortgages and trust deeds were jointly executed by Ben Hennagan and affiant. That the interest on the principal of the mortgages, as well as part of the principal of the mortgages, was paid by Ben Hennagan out of his own earnings. That since 1914 I have always considered and admitted that Ben Hennagan had a community interest in the original homestead and that said interest still survives to the date of this affidavit.

By decision dated November 23, 1923, the local officers held that the land patented to Hennagan under his original entry was community property, and recommended that the contest be dismissed.

Section 7 of the enlarged homestead act, under which the entry in question was made, provides that no residence shall be required on the additional entry "if the entryman is residing on his former entry" located not exceeding 20 miles away.

In paragraph 6 of the regulations of July 9, 1916, Circular No. 486 (45 L. D., 208), it is stated that if the land entered is within 20 miles of the original entry, the homesteader need not reside on the additional entry nor have a habitable house thereon "if he owns and resides upon the original tract when applying for said entry and continued both ownership and residence until submission of proof."

The construction placed on the statute by said paragraph 6 is, in my opinion, a proper one, if reasonably and liberally construed, as the manifest intention of Congress was to grant, under specified conditions, the right claimed by Hennagan to those who still have an interest in and are residing upon their original homestead entries.

While it may be that in this case Hennagan is not possessed of such a legal title in and to his original entry as had been recognized by the Department in construing other homestead laws, I am convinced that he has a substantial interest therein, the land having been acquired after foreclosure by his wife, and the indebtedness thereon having been paid off, wholly or largely, through his labor and earnings. Moreover, both he and his wife allege and regard the original homestead land as community property.

In administering section 7 of the enlarged homestead act, I regard this entryman's interest in his original homestead entry as sufficient to warrant the allowance and acceptance of his additional entry. Accordingly, final proof being found satisfactory, same is accepted, and the decision appealed from reversed.

**MYRTLE K. WELLS.**

*Decided June 25, 1924.*

**REPAYMENT—WAIVER—STATUTES.**

The requirement contained in the proviso to section 2 of the act of December 11, 1919, that a claim for repayment must thereafter be presented within two years from the issuance of patent or from the passage of the act, is mandatory and can not be waived because the claimant did not have knowledge of the act for more than two years after its enactment.

*FINNEY, First Assistant Secretary:*

In 1888 Harry Jones, now deceased, made preemption entry, Vancouver 06405, for the fractional NW.  $\frac{1}{4}$ , Sec. 18, T. 2 N., R. 5 E., W. M., Washington, under which he was required to pay, and paid \$2.50 per acre for the land when he should have been called on to pay only \$1.25 per acre.

The patent issued under that entry in 1891 and on October 31, 1923, or about 32 years later, Myrtle K. Wells, the daughter of the entryman, filed an application for repayment of the excess, which

was denied by the General Land Office decision of December 20, 1923, for the reason that the repayment could be made—

\* \* \* only under authority of the act of March 26, 1908 (35 Stat., 48), as limited by the act of December 11, 1919 (41 Stat., 366), by requiring that the applications for repayment of such excess be filed within two years from date of issuance of patent or two years from date of passage of the act of December 11, 1919.

While this application was made on a blank form intended for use in asking repayment under the act of 1908, *supra*, which, as amended in 1919, requires the presentation of applications within two years, and while the case was considered under that act only, the claim could have been made under the act of June 16, 1880 (21 Stat., 287), which was not repealed but merely supplemented by the act of 1908.

Congress has not specifically amended the act of 1880 by attaching to it the condition made by the act of December 11, 1919, which limited repayments under the act of 1908 to claims presented within two years; but in considering the effect of the limitation made by the act of 1919 this Department declared in the instructions of April 24, 1923 (49 L. D., 541), that the limitation made by the act of 1919 applies to claims made under either of the other acts mentioned.

For that reason the application in this case was properly denied notwithstanding the fact set up in the appeal that knowledge of these statutes did not come to this claimant for more than two years after the passage of the act of 1919.

The Land Department had no authority to do otherwise than to deny this application under the circumstances of this case and the decision appealed from is, therefore, hereby affirmed.

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**EXTENSION OF TIME FOR BEGINNING DRILLING OPERATIONS  
UNDER OIL AND GAS PERMITS—CIRCULAR NO. 801 (49 L. D.,  
403), AMENDED.**

**INSTRUCTIONS.**

[Circular No. 946.]

**DEPARTMENT OF THE INTERIOR,**

**GENERAL LAND OFFICE.**

*Washington, D. C., June 26, 1924.*

**REGISTERS AND RECEIVERS,**

**UNITED STATES LAND OFFICES:**

By act of Congress approved January 11, 1922 (42 Stat., 356), the Secretary of the Interior was authorized to grant an extension of time to comply with the drilling requirements under oil and gas

permits granted pursuant to the act of February 25, 1920 (41 Stat., 437). This act applies to the Territory of Alaska.

The text of the act is as follows:

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the Secretary of the Interior may, if he shall find that any oil or gas permittee has been unable, with the exercise of diligence, to begin drilling operations or to drill wells of the depth and within the time prescribed by section 13 of the Act of Congress approved February 25, 1920 (Forty-first Statutes, page 437), extend the time for beginning such drilling or completing it, to the amount specified in the Act for such time not exceeding three years and upon such conditions as he shall prescribe.

Accordingly, a permittee who has been unable with the exercise of due diligence to comply with the drilling requirements of a permit issued under any section of the act of February 25, 1920, may, if the facts warrant, be granted an extension of time upon filing an application therefor, accompanied by his own affidavit setting forth what efforts, if any, he has made to comply with the terms of his permit and the reasons for delay in the full compliance therewith, and such showing to be accompanied by the corroborating affidavit of at least one disinterested person having actual knowledge of the facts.

In making an application for extension of time the permittee must show that the corners of the claim have been marked with substantial monuments and that a notice has been posted as required in paragraph 1 of the permit as there is no provision of law under which the time may be extended for compliance with that requirement. The permittee must show whether or not any oil or gas well is being drilled on the geologic structure upon which the land embraced in the permit is located, or within approximately 10 miles of such land, and if such well is being drilled, give the legal subdivision, section, township, and range on which the well is located, and furnish as full information as he can as to when the well was begun, its approximate depth, the character of the formation penetrated and the prospects for discovery of oil or gas. If the application for extension is based upon contributions made by the permittee toward sinking of a test well upon the structure, full disclosure of the amount and nature of such contributions and the conditions under which the same were made must be shown, which showing must be corroborated by the affidavit of one or more of the parties under whose authority the well is being drilled.

The affidavit by the applicant must also show the time when he proposes to commence or resume his operations and any arrangement he has made for complying with the drilling requirements of the permit. If the applicant alleges that he has entered into a contract to drill the land, his application must be supported by the affidavit of the drilling contractor as to the terms of the contract, the means

at his command for carrying out the same, and the time when he expects to begin drilling operations thereunder.

An extension of time to perform one of the acts required by the permit necessarily extends for the same period of time for the performance of all subsequent requirements and as the bond is expressly limited by its terms to the period for which the permit was granted, the permittee must furnish a properly executed assent by the surety to the extension of his bond to cover the life of the permit as it will be extended if an extension is granted.

The application may be filed in the General Land Office or in the local land office having jurisdiction over the land involved by the permit. In the latter event proper applications will be promptly forwarded to this office by the local officers. In cases where applications for extensions filed in the local offices are not in accordance herewith, you will require the permittees to remedy the defects within 15 days from receipt of notice, and will transmit the applications with evidence of service and a report of action taken at the expiration of the time allowed.

Circular No. 801, approved January 12, 1923 (49 L. D., 403), is hereby amended so as to conform herewith.

WILLIAM SPRY,  
*Commissioner.*

Approved:

E. C. FINNEY,  
*First Assistant Secretary.*

## EXTENSION OF IRRIGATION CANALS OVER LANDS WITHIN A NATIONAL MONUMENT.

*Opinion, June 27, 1924.*

### RIGHT OF WAY—CANALS AND DITCHES—RECLAMATION—INDIAN LANDS—NATIONAL MONUMENTS—STATUTES.

The inhibition in the act of March 3, 1921, against the granting of rights of way over public lands within national parks and national monuments without specific authority of Congress is applicable to the extension of canals for the irrigation of Indian lands, and nothing in the act of August 30, 1890, reserving a right of way for ditches or canals constructed by authority of the United States, or in the appropriation acts providing for the construction of irrigation works for the benefit of the Indians, grants that authority.

### SOLICITOR'S OPINION CITED AND APPLIED.

Opinion in Arbuckle Reservoir Company (50 L. D., 388), cited and applied.

EDWARDS, *Solicitor*:

By letter of June 17, 1924, the Commissioner of Indian Affairs requested expression of my opinion in respect to the legality of a proposed extension of an irrigation canal across Sec. 16, T. 5 S.,

R. 8 E., Arizona, which section is within the Casa Grande National Monument.

It appears that Congress has from time to time made appropriations for the construction of dams, reservoirs, and canals for the irrigation of Indian Lands on the Gila River Indian Reservation. It is represented that in connection with the construction of this system it is necessary to construct what is known as the Pima lateral through the said national monument. It is further represented that this lateral as proposed will run along the margin of the reservation and will not molest any of the prehistoric or other ruins for which the reservation was established.

In my opinion of April 23, 1924, construing the act of March 3, 1921 (41 Stat., 1353), with reference to the Arbuckle Reservoir Company (50 L. D., 388), it was said:

The language of this law is comprehensive and absolute. It expressly prohibits the granting thereafter of any permit or other authorization for reservoirs or other works for storage or carriage of water within the limits of any national park or national monument without specific authority of Congress. The inhibition applies to such works for irrigation purposes as well as for power purposes. That such is the letter of the law can not be questioned, and the safeguard thus provided is just as appropriate in the one case as in the other. If a storage reservoir or a canal be regarded as objectionable and inconsistent with the purpose of the reservation when such structures are intended for use in connection with power development, it is difficult to see wherein they would be unobjectionable if intended for irrigation.

In submitting the instant case reference was made to the above opinion and two points were suggested as affording reasons why the act of March 3, 1921, should be held to furnish no obstacle to the construction of the canal in question. It is said that Congress has on several occasions voiced its opinion by specific acts relating to this project and therefore the act of March 3, 1921, does not affect the instant case. It is further contended that the act of August 30, 1890 (26 Stat., 371, 391), reserved a right of way for ditches or canals constructed by authority of the United States, and that the act of March 3, 1921, should not be construed as affecting the right of the Government to construct the proposed canal.

The act of August 30, 1890, would appear to have no application in the matter. That act merely provided that in the issuance of patents west of the 100th meridian there should be expressly reserved a right of way for ditches or canals constructed by authority of the United States. There is no patent involved in this case. The Government has not merely a right of way. It has the full title and may do with the land what it may please to do, but this may be done only by competent authority, and the executive branch may not do what is forbidden by Congress. By authority of Congress this tract has been reserved for a particular purpose, and Congress

has further said in the act of March 3, 1921, that it may not be used for canal or storage purposes without specific authority of Congress. I do not think such specific authority can be found in appropriation acts for a general project without expressed and direct reference to the particular area in question.

From the representations made, I am persuaded that this canal would not injure the reservation and that it is probably desirable and perhaps even essential from an engineering standpoint that it be constructed along the line laid down. Authority to do this can doubtless be obtained at the next session of Congress. In my opinion this Department has no power to authorize the construction under present law.

Approved:

F. M. GOODWIN,

*Assistant Secretary.*

#### DISPOSAL OF PUBLIC LANDS IN THE COLUMBIA OR MOSES RESERVATION, WASHINGTON—ACT OF JUNE 3, 1924.

##### INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

*Washington, D. C., July 1, 1924.*

REGISTER AND RECEIVER,

WATERVILLE, WASHINGTON:

Your attention is directed to the act of Congress approved June 3, 1924 (43 Stat., 357), entitled:

"An act to authorize acquisition of unreserved public lands in the Columbia or Moses Reservation, State of Washington, under Acts of March 28, 1912, and March 3, 1877, and for other purposes"

which reads as follows:

That from and after the passage of this Act all unreserved public lands within the former Columbia or Moses Reserve in the State of Washington, made subject to acquisition under the homestead laws by the Act of Congress approved July 4, 1884 (Twenty-third Statutes, page 76), be, and they are hereby, made subject to acquisition under the Isolated Tract (Act of March 28, 1912); Desert Land (Act of March 3, 1877), and other Acts applicable generally to the public domain.

The effect of the act is to make the said lands subject to disposition in like manner as other vacant, unappropriated, and unreserved public lands. Make appropriate notations on your records.

WILLIAM SPRY,

*Commissioner.*

Approved:

E. C. FINNEY,

*First Assistant Secretary.*

**STATE INDEMNITY SELECTIONS—FORM OF PATENT—ACT OF  
APRIL 14, 1914.****INSTRUCTIONS.****DEPARTMENT OF THE INTERIOR,***Washington, D. C., July 5, 1924.***THE COMMISSIONER OF THE GENERAL LAND OFFICE:**

The Department has considered your letter of June 30, 1924, requesting instructions as to whether the act of April 14, 1914 (38 Stat., 335), is applicable to State indemnity selections, and, if so, whether conveyance should be in form of patent or of a supplemental clear list.

In the instructions of June 3, 1914 (43 L. D., 271), the Department held that the act affected "all filings, locations, selections, or entries upon which patent or its equivalent has issued or may hereafter issue." The Department is of opinion that the interpretation thus placed on the act should be adhered to, and that in appropriate cases of State indemnity selections you cause to be issued a patent in substantially the following form:

The United States of America, to all to whom these presents shall come,  
Greeting:

Whereas, on \_\_\_\_\_ there was certified to the State of \_\_\_\_\_ the following described lands: \_\_\_\_\_ reserving to the United States all coal in said lands, and to it, or persons authorized by it, the right to prospect for, mine, and remove coal from the same upon compliance with the conditions of and subject to the limitations of the act of \_\_\_\_\_; and

Whereas, the lands so conveyed have been subsequently classified as noncoal in character:

Now, therefore, know ye, that the United States of America, in accordance with the act of Congress approved April 14, 1914 (38 Stat., 335), does hereby remise, release, and forever quitclaim unto the said State of \_\_\_\_\_ and to its assigns all rights, title, interest and estate to and in the above-described lands which may be vested in and possessed by it by virtue of the reservation hereinbefore mentioned and recited.

**E. C. FINNEY,***First Assistant Secretary.*

**EXTENSION OF TIME FOR PAYMENT—CROW INDIAN LANDS.****INSTRUCTIONS.**

[Circular No. 948.]

**DEPARTMENT OF THE INTERIOR,****GENERAL LAND OFFICE,***Washington, D. C., July 5, 1924.***REGISTER AND RECEIVER,****BILLINGS, MONTANA:**

The President's proclamation issued June 9, 1924, providing for further extension of time for payment by purchasers and entrymen under the President's proclamations of September 28, 1914 (38 Stat., 2029), and April 6, 1917 (40 Stat., 1653), of lands in the ceded portion of the Crow Indian Reservation, Montana, directs—

That any purchaser or entryman of lands within said former Reservation who is unable to pay the purchase money due under his purchase or entry made under the said Proclamation of September 28, 1914, or the said Proclamation of April 6, 1917, upon filing in the local land office an affidavit corroborated by two persons setting out his inability to make the required payment and the reasons therefor shall be granted an extension of time until the 1925 anniversary of the date of his entry or purchase upon the payment to the Receiver of the district land office of interest at the rate of five per cent per annum on the amounts extended from the maturities thereof to the expiration of the period of extension. The district land office will promptly notify all purchasers and entrymen entitled to the extension of the manner in which it may be obtained. If the affidavit is not filed and the interest paid within thirty days from receipt of notice, or if, within such time, the amounts in arrears are not paid in full, the purchases or entries for which the amounts are due will be reported by the district land office to the General Land Office for cancellation.

Pursuant to said proclamation the following regulations are prescribed:

1. The said proclamation of September 28, 1914, provided that one-third of the price of the land must be paid when the entry or purchase is made. In case of a purchase the balance of the price must be paid in two equal payments, one year and two years thereafter and in case of any entry in two equal payments three years and four years thereafter unless paid sooner. The said proclamation of April 6, 1917, provided that one-fifth of the purchase price must be paid on the day following the sale and that the balance must be paid in four equal annual installments in one, two, three, and four years after the date of sale unless paid sooner. By President's proclamations of May 5, 1920 (41 Stat., 1793), August 11, 1921 (42 Stat., 2246), July 10, 1922 (42 Stat., 2281), and December 18, 1923, extensions of time were allowed until the 1924 anniversaries of the

dates of the purchases and entries made under the said proclamations of September 28, 1914, and April 6, 1917. Under the present proclamation an extension of time to the 1925 anniversaries of said purchases and entries may be secured under the conditions specified therein.

2. Within thirty days from receipt of notice to be given by you immediately any purchaser or entryman whose payments are in default at the time of such receipt must either pay the amounts due in full or he may file in your office a corroborated affidavit setting out his inability to do so, and the reason therefor accompanied by interest at the rate of 5 per cent per annum on the amounts for which an extension is sought.

3. The time for any payment can not be extended to a date beyond the 1925 anniversary.

4. Proof may be submitted at any time before such anniversary provided the requirements of the law as to payments are complied with.

5. No extension will be allowed unless the affidavit and interest as herein required are transmitted to your office within the time allowed.

You will forward a copy of these instructions to each purchaser or entryman who is affected thereby, advising him that in order to secure the benefits of said proclamation he must comply with its requirements as herein explained, and that in the event of his failure to take such action within the time allowed, the purchase or entry will be reported for cancellation and forfeiture of payments without further notice to him.

You will in due time report the cases in which no action has been taken, transmitting evidence of service of notice.

WILLIAM SPRY,  
*Commissioner.*

Approved:

E. C. FINNEY,  
*First Assistant Secretary.*

CONTESTS AGAINST HOMESTEAD ENTRIES ON THE CHARGE OF  
ABANDONMENT—CIRCULAR NO. 750 (48 L. D., 78), AMENDED—  
CIRCULAR NO. 815 (48 L. D., 594), REVOKED.

INSTRUCTIONS.

[Circular No. 949.]

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

*Washington, D. C., July 11, 1924.*

REGISTERS AND RECEIVERS,

UNITED STATES LAND OFFICES:

Pursuant to a recent departmental ruling, Circular No. 815 of March 22, 1922 (48 L. D., 594), is hereby revoked, and you will be governed by the following:

In view of the provisions of section 1 of the act of July 28, 1917 (40 Stat., 248), you will not entertain a contest against a homestead entry on the charge of abandonment unless the affidavit of contest contains an allegation to the effect that the absence of entryman was not due to military or naval service, provided the entry was made prior to the termination of the war with Germany (fixed as March 3, 1921, by Public Resolution No. 64—41 Stat., 1359), or was based on an application filed prior to that date, or in which the claimant has filed a showing of settlement prior thereto.

As to entries made, or applications filed, or settlements initiated since March 3, 1921, the act of 1917 has no application, and in such cases it is unnecessary to allege or prove that the absence of entryman was not due to military or naval service.

Where the averment required by the act of 1917 is necessarily made, and the contestee in his answer joins issue on the allegation, it will be necessary for the contestant to submit evidence in support thereof; otherwise, the averment will be treated as established by the affidavits of the witnesses who corroborated the contest affidavit. Likewise, in those cases in which the contestee fails to answer after due service of notice of the contest, the averment of non-military service will be treated as established by the affidavits of the corroborating witnesses.

The provisions of paragraph (c) of Circular No. 750 (48 L. D., 78), are modified to agree with the foregoing.

WILLIAM SPRY,  
*Commissioner.*

Approved:

E. C. FINNEY,

*First Assistant Secretary.*

## EMPIRE STATE OIL COMPANY.

*Decided July 15, 1924.*

## REPAYMENT—FEES—ABANDONMENT—MINING CLAIM—OIL AND GAS LANDS—LEASE.

One who, after having filed an application for a mineral patent, quitclaims to the Government his interest in the mining claims and obtains a lease under the act of February 25, 1920, is not entitled to repayment of the filing fee, inasmuch as such transaction amounts to a voluntary abandonment of the original claim, and not to a rejection of the application.

## REPAYMENT—FEES—OFFICERS—MINING CLAIM.

The filing fee paid in connection with an application for a mineral patent is no more a fee for personal services of the local officers than other fees and commissions paid in connection with an entry of public land, and should be repaid in a proper case.

## DEPARTMENTAL DECISION CITED AND APPLIED.

Case of Sophia Eder (14 L. D., 645), cited and applied.

FINNEY, *First Assistant Secretary*:

The Empire State Oil Company has appealed from a decision of the Commissioner of the General Land Office dated March 14, 1924, denying repayment of the filing fee paid in connection with rejected mineral application Lander, Wyoming, 012301. Repayment is claimed under the act of March 26, 1908 (35 Stat., 48), for the alleged reason that the application was rejected by the Commissioner without fraud on the part of the applicant and, under the provisions of said act, repayment of the money paid in connection with the application should be allowed.

In the decision complained of the Commissioner denied the application for the reason that the fee paid was required under paragraph 9, section 2238, Revised Statutes, governing the allowance of the fees to registers and receivers, which provides:

9. A fee of \$5 for filing and acting upon each application for patent or adverse claim filed for mineral lands, to be paid by the respective parties.

The Commissioner decided that fees paid under this section have uniformly been held to have been paid for services of the local officers in filing and acting upon the application and consequently not repayable under any of the repayment laws.

The Department concurs in the Commissioner's action denying the application for repayment but not for the reason stated, in which it can not concur. The fee paid is no more a fee for personal services of the local officers than other fees and commissions paid in connection with an entry of public land, and in a proper case should be repaid as in the case of fees paid in other cases. See Sophia Eder (14 L. D., 645).

It appears from the record that the mineral application was filed June 1, 1920; that on August 24, 1920, claimant filed application under the act of February 25, 1920 (41 Stat., 437), for an oil and gas lease on said land, together with a quitclaim deed to the Government of the property included in the mining claim, which was purported to have been executed in support of the application for lease. The lease under said act of February 25, 1920, has been issued. It accordingly appears that rather than attempt to perfect its claim under the law under which it was first filed, claimant evidently decided to take advantage of the provisions of section 19 of said act of February 25, 1920, and obtain a prospecting permit therefor and continue operations under that law rather than under the mineral laws. Consequently it can not be said that the mineral application was rejected within the contemplation of the act of March 26, 1908, but was voluntarily abandoned and the claim prosecuted under a new and different law, which was evidently believed to be more advantageous to claimant. It was not rejected because of any defect or objection affecting its allowance but on account of its voluntary abandonment by claimant and there is no provision in the repayment laws warranting repayment under such circumstances.

The action of the Commissioner in denying repayment is affirmed.

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### SOUTHERN PACIFIC RAILROAD COMPANY.

*Decided July 15, 1924.*

#### MINING CLAIM—NOTICE—RECORDS—FORFEITURE.

Failure to record the location notice of a mining claim does not render the location invalid or work a forfeiture of the claim in the absence of intervening adverse rights under the mining laws, where the local customs or statutes do not so provide.

#### MINING CLAIM—NOTICE—SURVEY—EVIDENCE.

Where a variance or discrepancy between a mineral location notice or certificate and the stakes and monuments on the ground exists, the latter are more certain evidence of the exact situs of the claim and will prevail.

#### MINING CLAIM—SURVEY—EVIDENCE.

To determine the necessity of a segregation survey, it should be established with certainty by competent testimony that a mining claim includes or invades a subdivision and that the valuable mineral lands are within the boundaries of the claim.

*FINNEY, First Assistant Secretary:*

The Department, in its decision dated December 9, 1922, in the case of the United States *v.* Southern Pacific Railroad Company (unreported), affirmed a decision of the Commissioner of the Gen-

eral Land Office, holding for cancellation said company's list of lands claimed under its grant, No. 169, Los Angeles serial 024247, as to certain tracts of land therein appearing, among them that part of the area of the NW.  $\frac{1}{4}$ , Sec. 5, T. 6 N., R. 10 E., covered by the Billy Boy lode mining claim, and directed that if the decision became final a segregation survey be made of the claim.

The decision became final and the surveyor general was instructed to make the survey. On July 5, 1923, the surveyor general reported that he was unable to secure a certified copy of the location notice; that the county clerk of San Bernardino County, California, had advised him that no record of said claim could be found among the records of his office; that he had endeavored to secure the original location notice from the claimant without success.

The Commissioner requests instructions as to procedure under the circumstances disclosed.

The record in this case has been reexamined. It appears that no copy of the location notice of the Billy Boy claim has been filed with the record or submitted at the hearing. The Government's testimony contains no specific or definite statements to the effect that the monuments and lines of this claim were found or traced. A diagram of the claim prepared, and referred to, by a mineral examiner of the General Land Office in his testimony, though marked for identification, was not offered in evidence. The diagram, however, accompanied the record and has been transmitted to the surveyor general as an aid in making the survey.

It appears, however, that Leroy A. Palmer, a Government mineral examiner, and W. L. Garriott, the mining claimant, testified to the effect that certain development work and mineral showings on the NW.  $\frac{1}{4}$ , Sec. 5, were on the Billy Boy claim. It will be presumed, there being no evidence to impeach it, that such statements are based on knowledge of the location of the corners and lines of the claim, otherwise they could not truthfully have been made, and that these witnesses did ascertain from evidence on the ground the situs of the location.

The failure to record the notice does not render the location invalid, or work a forfeiture of the claim in the absence of intervening adverse rights under the mining laws, where the local customs or statutes do not so provide. (*Sturtevant v. Vogel*, 167 Fed., 448, 453; *Lindley on Mines*, section 390.) This is the view taken by the Supreme Court of California. (*Kern v. Lee*, 129 Cal., 369, 61 Pac., 1124; *Daggett v. Yreka Min. Co.*, 149 Cal., 360, 86 Pac., 968. Furthermore, it is well established that in a case of variance or discrepancies between location notice or certificate and the stakes and monuments on the ground, the latter prevail and are more certain

evidence of the exact situs of the claim, and if the boundaries of a claim are certainly established in conformity with such monuments and stakes, the claimants of the location or of the adjacent ground would not be heard to assert a different location in case the notice thereafter produced should vary from the claim as marked on the ground.

The surveyor general should therefore be directed to endeavor to effect a segregation survey of the claim governed by the stakes and monuments on the ground, and in ascertaining their position the mineral examiner, Palmer, should be directed to furnish such information and assistance in his possession and power as may aid the surveyor in the identification of the claim.

In the event that the Billy Boy claim can not be located by this means, inasmuch as the testimony adduced shows that the NW. 4, Sec. 5, was certainly identified and sufficiently shows that a part thereof is valuable for its mineral deposits, the defendant company should be cited to show cause why the entire subdivision should not be eliminated from its grant. The defendant company may under such order supply the necessary evidence to identify and locate the claim and show that the land adjudged to be mineral in the Department's decision is within the boundaries of the claim.

In cases arising hereafter, where there is an endeavor to show that certain subdivisions claimed under a railroad grant or under the agricultural land laws embrace in whole or part a subsisting mining location containing valuable mineral ground, evidence should be adduced, showing with as much certainty and precision as the available facts and circumstances admit, that such location lies in whole or part within one or more of the subdivisions in question.

This should be done by adducing testimony from witnesses who show that they have actually identified, either by the aid of the monuments and markings on the ground, or by the calls and descriptive data in the location notice or certificate, or by the aid of both, the ground covered by the mining location, and who furnish in their testimony such diagrams or descriptive matter based on their knowledge, relative to the situation of the claim with respect to a proven, established United States public or mineral survey corner and the lines and corner of the containing subdivisions, as will enable the Department to clearly and certainly determine that the mining claim is included in or invades such subdivision or subdivisions and that the valuable mineral lands are within the boundaries of the claim. Without such evidence it can not be determined whether or not a segregation survey is warranted.

In accordance with these views the case is remanded for proper action, in conformity with these instructions.

# SECTION 2 OF STOCK-RAISING HOMESTEAD ACT AMENDED—RESIDENCE PRIOR TO DESIGNATION—ACT OF JUNE 6, 1924.

## INSTRUCTIONS.

[Circular No. 952.]

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., July 19, 1924.

REGISTERS AND RECEIVERS,

UNITED STATES LAND OFFICES:

By an act of Congress approved June 6, 1924 (43 Stat., 469), section 2 of the stock-raising homestead act of December 29, 1916 (39 Stat., 862), was amended to read as follows:

SEC. 2. That the Secretary of the Interior is hereby authorized, on application or otherwise, to designate as stock-raising lands subject to entry under this Act lands the surface of which is, in his opinion, chiefly valuable for grazing and raising forage crops, do not contain merchantable timber, are not susceptible of irrigation from any known source of water supply, and are of such character that six hundred and forty acres are reasonably required for the support of a family: *Provided*, That where any person qualified to make original or additional entry under the provisions of this Act shall make application to enter any unappropriated public land which has not been designated as subject to entry (provided said application is accompanied and supported by properly corroborated affidavit of the applicant, in duplicate, showing prima facie that land applied for is of the character contemplated by this Act), such application, together with the regular fees and commissions, shall be received by the register and receiver of the land district in which said land is located and suspended until it shall have been determined by the Secretary of the Interior whether said land is actually of that character. That during such suspension the land described in the application shall not be disposed of; and if the said land shall be designated under this Act, then such application shall be allowed, otherwise it shall be rejected, subject to appeal; but no right to occupy such lands shall be acquired by reason of said application until said lands have been designated as stock-raising lands, unless the applicant actually establishes his residence and resides on the land; and until final action on such application, the settler may, if the land be not designated under this Act, change his application to one under the enlarged homestead law if such lands be designated thereunder, or to one under the ordinary provisions of the homestead law: *Provided*, That if the settler shall change his application he shall embrace therein the lands upon which his residence and principal improvements are located, and conform to the provisions, limitations, and conditions of the applicable law.

The effect of the act is to permit a person who applies to make entry under the stock-raising homestead act for an undesignated tract of land and files therewith a petition for its designation to occupy the land prior to its designation, provided he actually establishes residence on the land and continues to reside thereon during such occupation; and if the petition for designation be denied, the

See Case 7 John F. Silver  
5210499

As to possession or occupancy - see 5 Wall 461

See 51 T 4661

See also as to settlement  
41 L 627

As to matured license - see 34 Op. A. G. 320

settler may change his application to one under the enlarged homestead act or to one under the ordinary provisions of the homestead law, provided he is qualified to make such an entry.

An applicant who desires to change his application to one under the enlarged homestead act must file in the local office, before *final* action is taken on the stock-raising homestead application, a supplemental application on the form prescribed by the Department for making such entries, and, if there be pending a junior application to make entry under any law other than the stock-raising homestead act, the applicant must also file his affidavit, corroborated by two persons, setting forth therein the date when he established actual residence on the land and to what extent the residence was thereafter maintained. The affidavit should describe the legal subdivisions on which residence was maintained and on which the improvements are located. An entry under the enlarged homestead act may not include two incontiguous tracts, except additional entries may embrace two or more incontiguous tracts if they are contiguous to the original entry.

If the land sought under a change of application has not been designated under the enlarged homestead act, a proper petition for its designation must be filed, in accordance with existing regulations.

The amendment of said section 2 permits an entryman under the stock-raising homestead act to claim credit for residence on the land and improvements made after the date of his application and petition for designation.

The object of Congress in amending said section 2 being to validate, under the conditions prescribed, occupation of the land prior to its designation, the fact that an applicant avails himself of the privilege of residing on the land prior to designation will not defeat the preferential right provided for by section 8 of the act.

WILLIAM SPRY,  
*Commissioner.*

Approved:

E. C. FINNEY,  
*First Assistant Secretary.*

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J. SAM FRIEDMAN.

*Decided July 21, 1924.*

**OIL AND GAS LANDS—PROSPECTING PERMIT—FEES—ADVERSE CLAIM.**

An application for an oil and gas prospecting permit under the act of February 25, 1920, does not have an exclusive, segregative effect, and failure on the part of the applicant to pay the requisite filing fees until long after the time allowed by the regulations, is, in the absence of a

showing of proper cause for the delay, a ground for the rejection of the application where an adverse application had been filed prior to the payment of the full filing fees.

OIL AND GAS LANDS—PROSPECTING PERMIT—FEES—ACCOUNTS—PRACTICE.

As neither the leasing act of February 25, 1920, nor the regulations thereunder specify the procedure to be followed where applicants for prospecting permits tender an insufficient filing fee, the general instructions of August 9, 1918, Circular No. 616, relating to the keeping of records and accounts, are applicable.

DEPARTMENTAL DECISION CITED AND APPLIED.

Case of *Enlow v. Shaw et al.* (50 L. D., 339), cited and applied.

FINNEY, *First Assistant Secretary*:

J. Sam Friedman, who filed application on November 28, 1923, pursuant to section 13 of the leasing act of February 25, 1920 (41 Stat., 437), for a permit to prospect for oil and gas upon, among other tracts, the W.  $\frac{1}{2}$ , Sec. 14, T. 26 S., R. 27 E., M. D. M., Visalia, California, land district, has appealed from the decision of the Commissioner of the General Land Office, dated March 21, 1924, which rejected his application as to the described tract because of its conflict with an application for a similar permit filed by Anna T. Fitzhugh on November 3, 1923.

In this appeal it is pointed out that the applicant, Anna T. Fitzhugh, failed to pay the full filing fee prescribed and to furnish a proper surety bond, although required to do so by the local officers. Appellant claims that his application barred any subsequent compliance with these requirements, and that he is entitled to priorities over the said Anna T. Fitzhugh.

The records disclose that the applicant, Fitzhugh, tendered \$10 with her application instead of the correct filing fee of \$24, and that she failed to furnish a bond in the sum of \$2,000, as required by the regulations of March 11, 1920 (47 L. D., 437), and that, by decision dated November 5, 1923, the local officers required that the additional fees be paid within 15 days from notice. This letter was, on November 6, 1923, delivered at the applicant's address of record to M. Fitzhugh, who receipted for said letter as her agent.

On March 31, 1924, the additional fees were paid, and on April 11, 1924, a proper bond was filed. This action was taken before notice by the Commissioner to pay the fees and file the bond, required in his decision of April 7, 1924, was received by the applicant Fitzhugh.

The failure to file the \$2,000 bond was not material, as action was necessary, by the Commissioner, on the matter of preference rights of the surface entrymen, for whose benefit the bond was required.

As to filing fees, however, the regulations of March 11, 1920, *supra*, do not specify the procedure to be followed where insufficient money

is tendered, and the general instructions on keeping of records and accounts, Circular No. 616, approved August 9, 1918 (46 L. D., 513), apply. Section 8 of said regulations provides in part—

where an insufficient amount is tendered in any form, you will merely *suspend* the application, etc., and allow the party 30 days in which to tender the required amount. [*Italics supplied.*]

While it appears that only 15 days was allowed Anna T. Fitzhugh within which to furnish the proper filing fee, it also appears that the fee was not in fact paid until more than four months had elapsed.

An application for a permit does not have an exclusive, segregative effect, and other applications may be filed, which become effective upon the rejection of the prior application. *Enlow v. Shaw et al.* (50 L. D., 339). Here it appears that Anna T. Fitzhugh failed to comply with the proper requirement by the local officers that she pay the requisite filing fees, until long after the time allowed by those officers, and by the Department's regulations. No cause has been shown for the delay.

The Commissioner's decision is accordingly modified, and he will allow the applicant Fitzhugh 15 days from notice to show cause why her application should not be rejected to the extent of its conflict with adverse applications pending prior to the payment of the full filing fees; and unless proper cause be shown her application will be rejected to that extent.

The case is remanded for the action herein directed.

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## GREAT NORTHERN RAILWAY COMPANY.

*Decided July 21, 1924.*

### SELECTION—RAILROAD LAND—MINERAL LANDS—SURVEY—EVIDENCE.

A selection of unsurveyed land made under the act of August 5, 1892, which authorizes the selection of nonmineral public lands, so classified at the time of actual Government survey but which further expressly recognizes the privilege of selecting unsurveyed lands, nonmineral in fact, is not defeated by the mere observation of the surveyor that mineral indications are found in the township, especially where the selection has stood for a long time and any doubt implied from the surveyor's remarks has since been removed by close examination and the selected tract found to be nonmineral in fact.

FINNEY, *First Assistant Secretary*:

The Great Northern Railway Company, as successor in interest to the St. Paul, Minneapolis and Manitoba Railway Company, has appealed from the decision of the Commissioner of the General Land Office of February 5, 1924, holding for cancellation supplemental list No. 3 D, Seattle 04814, embracing lot 1, Sec. 24 (37.79 acres),

the SW.  $\frac{1}{4}$ , Sec. 25 (160 acres), and lots 8, 9, 14, and 15, Sec. 35 (155.93 acres), in T. 28 N., R. 10 E., W. M., Washington.

The law under which the railway company claims the lands above mentioned is the act of August 5, 1892 (27 Stat., 390). This act was passed to enable the railway company last mentioned to select lieu lands in place of lands within the limits of its grant settled upon or otherwise disposed of during a period when its right thereto was not recognized. By the terms of the act, the railway company was authorized to select as lieu lands—

an equal quantity of nonmineral public lands, so classified as nonmineral at the time of actual Government survey which has been or shall be made, of the United States not reserved and to which no adverse right or claim shall have attached or have been initiated at the time of the making of such selection lying within any State into or through which the railway owned by the said railway company runs, \* \* \*

The company on April 6, 1894, selected certain unsurveyed lands, describing them by metes and bounds, including the lands here involved. These tracts were later officially surveyed, the plat being filed in the local land office January 11, 1922.

January 23, 1922, the company filed a supplemental list describing the lands listed in conformity with the subdivisional survey description.

In the field notes of the survey completed October 23, 1920, it was stated that "there are considerable mineral indications, copper predominating" and in the field notes of a partial survey of the township the surveyor stated the following:

The soil is clay and rocks and worthless for agriculture. Seams of quartz are found at various points, containing some silver, but so far as known nothing of commercial value has been discovered.

In the decision appealed from the Commissioner held that the surveyor's return did not classify the lands as nonmineral and for that reason the selection was held for cancellation. It was further held that in case of appeal the company should file an election to take the S.  $\frac{1}{2}$  SW.  $\frac{1}{4}$ , Sec. 25, and lots 14 and 15, Sec. 35, T. 28 N., R. 10 E., subject to the provisions of section 24 of the Federal Water Power Act of June 10, 1920 (41 Stat., 1063), reserving to the United States, its permittees or licensees the right to enter upon, take and use any or all of said lands for power purposes. This for the reason that these tracts were withdrawn by Executive order of June 30, 1916, for Power Site Reserve No. 533.

An examination of the record discloses that the tracts involved were examined by a special agent of the General Land Office who reported thereon under date of February 22, 1923, to the effect that the lands are nonmineral in character and that patent should issue in the absence of other objection.

The observation of the surveyor above quoted can not be regarded as a conclusive mineral return nor perhaps as a decisive nonmineral return. It amounts to nothing more than a *caveat* or warning that there were some mineral indications in some portions of the township. It could not be relied upon as a classification of the lands in respect to their mineral content. Any doubt implied by the surveyor's remarks has since been settled by the examiner's report.

The cancellation of the selection under such circumstances would be a harsh and unnatural construction and application of the law. The act granting the right of selection was a remedial measure not for the benefit of the company but for the benefit of settlers who had been allowed by erroneous action of the Land Department to acquire lands belonging by right to the company. This was not an enlargement of the original grant but was merely the adoption of a method to permit the company to take other lands in lieu of those originally granted so that the settlers might be allowed to retain their claims which were erroneously allowed in the first instance. The act expressly recognized the privilege of the company to select unsurveyed lands nonmineral in fact. This selection was so made and has stood for about 30 years. It is not within the realm of practical procedure to hold that a mere improvident and inconclusive report by a surveyor made many years after the date of selection is effective to destroy a claim of 30 years' standing, especially where, as in this case, any objections implied in such report have been removed by more positive and reliable evidence. The said remedial act expressly provides that the company shall not be required to relinquish a greater area than it is permitted to select in lieu thereof. It may be safely assumed that after 30 years and in view of the reduced area and condition of the remaining public domain, the company would be put to great disadvantage, if not actually defeated, in attempting to satisfy its grant if this selection be canceled. It should not be done unless clearly required by the exactions of the law. Under the circumstances of this case the Department is of opinion that the law does not so require. The selection was properly received when made and no present obstacle to its approval is observed.

In respect to the power site withdrawal, this case is similar to that of Great Northern Railway Company, Seattle 04568, wherein it was held by decision of the Department under date of June 25, 1924 (unreported), that the selection was unaffected by power site withdrawal inasmuch as the selection was fully completed prior to withdrawal with the exception only of the formal adjustment of description to the terms of survey of the lands involved.

The action appealed from is accordingly reversed.

**FORT ASSINNIBOINE ABANDONED MILITARY RESERVATION—  
EXTENSION OF TIME TO MAKE PAYMENTS—ACT OF JUNE 7,  
1924.**

**INSTRUCTIONS.**

[Circular No. 954.]

**DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE,  
Washington, D. C., July 22, 1924.**

**REGISTER AND RECEIVER,**

**HAVRE, MONTANA:**

Public Resolution No. 29 entitled "Joint Resolution Providing and extension of time for payment by entrymen of lands on the Fort Assinniboine abandoned military reservation in the State of Montana," which was approved June 7, 1924 (43 Stat., 666), reads as follows:

That the Act of January 6, 1921 (Forty-first Statutes at Large, page 1086) providing additional time for the payment of purchase money under homestead entries within the former Fort Assinniboine Military Reservation, in Montana, be, and the same is hereby, amended so as to authorize extensions of time from year to year for the payment of all unpaid principal upon the payment of interest thereon in advance at the rate specified in the said Act, for not to exceed ten years from date of entry.

The said act applies to the lands in the Fort Assinniboine abandoned military reservation, which was opened to entry on November 15, 1916, under the act of February 11, 1915 (38 Stat., 807).

The act of January 6, 1921 (41 Stat., 1086), and regulations thereunder, Circular No. 739 (48 L. D., 35) provided for an extension of time to make payment for one year by paying interest at 5 per cent per annum on the unpaid installments due before the date of the act. The unpaid installment due within the year subsequent to the date of this act could be extended for one year by paying interest thereon as above. The installments above extended could be further extended for a period of one year in like manner in the discretion of the Secretary of the Interior.

Circular No. 899 (49 L. D., 599) suspended action on the meritorious cases where entrymen were unable to make payment for not exceeding one year, pending action by Congress, and Circular No. 914, issued February 8, 1924 (50 L. D., 276), allowed extensions of time to make payment of installments due until December 31, 1924. The circulars required that the entrymen file affidavit corroborated by two other persons showing the reason why payment was not made. Interest was not required to be paid in the case of extensions of time to make payment granted under the said circulars.

The above act of January 6, 1921, and Circular No. 739, were amended by this act so that the extensions may be granted from year to year, though not for more than one year at a time, and extensions are limited to 10 years from the date of entry. Entry-men desiring an extension of time under this act should apply therefor and accompany the application with the required amount of interest at the rate of 5 per cent per annum, on the unpaid installments. You will grant the extensions when the interest required is paid, and note on the records, period of extension and that the interest was paid in conformity with this act. Forward the application to this office. Interest will be collected on any installment for the period it was extended under the above Circulars Nos. 899 and 914.

WILLIAM SPRY,  
*Commissioner.*

Approved:

E. C. FINNEY,

*First Assistant Secretary.*

## SELECTIONS—APPROVED FORM OF NONMINERAL AFFIDAVIT.

### INSTRUCTIONS.

[Circular No. 956.]

DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE,  
*Washington, D. C., July 23, 1924.*

### REGISTERS AND RECEIVERS,

#### UNITED STATES LAND OFFICES:

Each application to list or select lands in satisfaction or grants made by Congress for railroad, wagon road, or canal purposes must be filed in triplicate and the original must be accompanied, at the time of filing, by an affidavit made by an authorized examiner, agent, or employee of the applicant, showing that the lands sought to be listed or selected are nonmineral in character. Each such affidavit must be based on personal knowledge of the affiant and must give the date or dates that examination of the land was made. The attached form of affidavit, approved by the Commissioner of the General Land Office on June 30, 1911, must be used. The usual fees must accompany the said list or selection.

Upon receipt of such a list or selection you will cause it to be examined and certify the same as to such tracts against which there is no objection.

You will then return the triplicate to the applicant with your notice of rejection or allowance, retain the duplicate for your files, and at the proper time transmit the original to this office in the regular order of business.

If any part of the list or selection is not subject to appropriation by the applicant or if any part of said list or selection is not covered by the proper nonmineral affidavit, you will, as to such tracts, reject the same subject to the usual right of appeal.

If no appeal is taken within the time allowed, your action becomes final and eliminates such rejected tracts from the list or selection. You will specifically describe on the lists or selections the tracts so eliminated. You will apply the proper amount of fees covering the land that is clear and return the balance, if any, without further notice from this office.

If, within the time allowed, an appeal is taken, you will transmit it with the original list or selection to this office in the regular order of business, and certify only the land against which there is no cause for rejection. You will apply the proper amount of fees covering the said land that is clear and hold the balance as unearned until further notified by this office.

Under these instructions the attached form of nonmineral affidavit must be used and must be filed at the same time the selection or list is filed. Also, these instructions revoke the present practice of requiring the applicant to file supplemental lists or selections "A" and "B," respectively, for lands that are clear and those that are not clear.

Circular of July 9, 1894 (19 L. D., 21), is hereby revoked. However, this does not rescind or in any way effect the necessity of publication where the same is *now* otherwise required.

WILLIAM SPRY,  
*Commissioner.*

Approved:

E. C. FINNEY,

*First Assistant Secretary.*

*Nonmineral Affidavit for Listing and Selections Under Railroad Grants.*

STATE OF \_\_\_\_\_ }  
County of \_\_\_\_\_ } ss.

\_\_\_\_\_, being duly sworn according to law, deposes and says, that he is a citizen of the United States and that his post office address is \_\_\_\_\_; that on \_\_\_\_\_ he personally examined each and every legal subdivision of the lands embraced in the attached list marked exhibit "A" and made a part hereof, situated in \_\_\_\_\_ Land District, State of \_\_\_\_\_; that at the time of such examination there was not within the limits of said land any known vein or lode of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, or copper;

that there was not, within the limits of said land, any known placer deposit, oil, or any valuable mineral, other than iron or coal; that said land contained no salt spring or known deposit of salt in any form sufficient to render it chiefly valuable therefor; that no portion of said land was claimed or worked for mining purposes, under the local customs or rules of miners, or otherwise, during any portion of the year; \_\_\_\_\_

\_\_\_\_\_;  
that the said land was essentially nonmineral in character, had upon it no mining improvements \_\_\_\_\_

\_\_\_\_\_;  
and that the selection thereof is not made for the purpose of obtaining title to mineral lands.

I hereby certify that the foregoing affidavit was read to the affiant in my presence before he signed his name thereto; that said affiant is to me personally known (or has been satisfactorily identified before me), and I verily believe him to be a credible person and the person he represents himself to be, and that this affidavit was subscribed and sworn to by him before me on this \_\_\_\_\_ day of \_\_\_\_\_, 1924.

## REPAYMENT OF MONEYS DEPOSITED WITH APPLICATION FOR COAL LAND LEASE IN CASE OF DEFAULT.

*Instructions, July 25, 1924.*

### REPAYMENT—COAL LANDS—LEASE—FEES—FORFEITURE—STATUTES.

An application for coal lease under section 2 of the act of February 25, 1920, is a filing within the meaning of the repayment statutes; and the coal leasing regulations of April 1, 1920, declaring a forfeiture of the deposit made by a successful bidder in case of his default, did not intend to preclude repayment of such deposit where repayment is warranted under the act of March 26, 1908.

### REPAYMENT—COAL LANDS—LEASE—STATUTES.

Where an applicant for a coal lease under section 2 of the act of February 25, 1920, fails to comply with the terms of the bid, and his application is rejected, without fraud or fault on his part, the application becomes one rejected within the contemplation of the repayment act of March 26, 1908.

### DEPARTMENTAL DECISION CITED AND APPLIED.

Case of John J. Kotkin (49 L. D., 344), cited and applied.

*FINNEY, First Assistant Secretary:*

By your [Commissioner of the General Land Office] letter of April 28, 1924, you request advice as to whether or not the deposit required under the instructions regulating coal leases under the coal leasing provisions of the act of February 25, 1920 (41 Stat., 437), should be considered as forfeited in case of default on the part of the lessee in complying with the requirements connected with the

lease as provided by such regulations, or whether or not it can be repaid under the repayment laws.

In my opinion, repayment of such deposit can be made in a proper case. It was held by the Department in the case of John J. Kotkin (49 L. D., 344), that an application for an oil and gas prospecting permit under the act of February 25, 1920, *supra*, is a filing of the character contemplated as within the scope of the provisions of the repayment act of March 26, 1908 (35 Stat., 48), and repayment of the filing fee paid in connection with such application was allowed notwithstanding the fact that the regulations in connection therewith provide that same should be considered as earned when paid and to be credited in equal parts on the compensation of the register and receiver. It was further held in said case that said act made no provision for the forfeiture of moneys paid in connection with such an application, nor did it directly or indirectly repeal or modify any provision of the general repayment statutes.

No valid reason is seen why an application for a coal lease under section 2 of the act would not also be a filing within the contemplation of said repayment statutes, and the regulations of April 1, 1920 (47 L. D., 489, 494), declaring a forfeiture of the deposit made by the successful bidder in case of his default, should not be considered as effectually preventing repayment in a case where repayment would be warranted under the act of March 26, 1908, were it not for such regulations. In the case submitted by you it appears that the bid was rejected because of the lessee's failure to complete his bid, which failure was caused without fault on his part, but by reason of matters over which he had no control. The bid made under the application is a part thereof, the whole transaction merging into a contract when the bid has been fully complied with and the lease duly issued. If the applicant fails to comply with the terms of the bid and same is rejected, without fraud or fault on the part of the applicant, the application becomes one rejected within the contemplation of the act of March 26, 1908, and an application seeking repayment of the deposit made should be given proper consideration under said repayment act. The regulations governing bids under the coal lease provisions of said act of February 25, 1920, to the effect that in case of default on the part of a bidder, the deposit will be forfeited and disposed of as other receipts under the act, was intended for administrative purposes to direct by such regulations the manner in which the receivers of public moneys are to account for the same to the Government, and in no manner was it intended thereby to foreclose or deny the right of an applicant under the repayment laws to seek repayment of the deposit made.

## HEIRS OF M. M. SANDON.

*Decided July 28, 1924.*

## SURVEY—SETTLEMENT—STOCK-RAISING HOMESTEAD—SCHOOL LAND.

An entry under the stock-raising homestead act predicated upon a settlement on land within a school section will be allowed where the settlement was made and the designation of the land under that act became effective prior to the completion of the survey in the field and no protest is entered by the State against the allowance of the entry.

FINNEY, *First Assistant Secretary*:

Sec. 16, T. 4 S., R. 57 E., M. M., Montana, was designated under the enlarged homestead act on May 1, 1909, and under the stock-raising homestead act on June 30, 1920, effective July 30, 1920. The plat of survey of said township was approved September 22, 1922, and was filed in the local office on October 22, 1923.

On the date last named Charles M. Sandon, as heir of his mother, M. M. Sandon, applied to make entry under the stock-raising homestead act for N.  $\frac{1}{2}$ , said Sec. 16, alleging by corroborated affidavit that his mother settled on the land in May, 1918, and that she resided on and improved the land until the date of her death, which occurred in June, 1921. The local officers rejected the application because the land described is part of a "school section." On appeal, the Commissioner of the General Land Office, by decision dated May 5, 1924, affirmed the action of the local officers, holding that the land was not subject to settlement under the stock-raising homestead act prior to its designation, and that the right of the State under its grant by the act of February 22, 1889 (25 Stat., 676), attached before the designation of the land as stock-raising became effective. An appeal to the Department has been filed.

It appears from the records of the Land Department that the survey of the subdivisions in the township was begun July 23, 1920, and completed August 3, 1920. The survey of Sec. 16 was performed, according to the field notes, on July 30 and 31, 1920.

The survey in the field of said Sec. 16 was not completed until July 31, 1920, whereas the designation of the land as stock-raising became effective July 30, 1920. Mrs. Sandon's rights as a settler therefore attached prior to the survey in the field.

The State was furnished with a copy of the affidavit of settlement, but has not challenged the validity of the claim. Therefore, the application will be allowed after its correction to read "Charles M. Sandon for the heirs of M. M. Sandon," leaving to the local courts the determination of who are the heirs of said settler.

The decision appealed from is reversed.

**JAMES H. SMITH AND BERNARD H. JOHNSTON.**

*Decided July 28, 1924.*

**COAL LANDS—IMPROVEMENTS—DECLARATORY STATEMENT—STATUTES.**

Mere prospecting for coal as preliminary to the opening of a mine does not constitute the commencement of improvements as that term is used in section 2349, Revised Statutes, and the period covered by such preliminary prospecting can not be regarded as falling within the 60-day period during which a coal declaratory statement is required to be filed.

**COAL LANDS—DECLARATORY STATEMENT—IMPROVEMENTS—EVIDENCE.**

Averments in a coal declaratory statement to the effect that the declarant had caused an open cut about 8 feet wide to be driven upon a vein of coal that was already exposed by a creek running through the land "thereby opening and improving a vein of good merchantable coal about 7 feet thick," are too general and indefinite to establish the opening and improving of a mine of coal as of the date of the filing of the declaratory statement within the contemplation of the coal land laws.

**DEPARTMENTAL DECISIONS CITED AND APPLIED.**

Cases of *McKenna v. Seymour* (47 L. D. 395), and *J. T. Williams and John Blathran* (48 L. D., 176), cited and applied.

*FINNEY, First Assistant Secretary:*

This is an appeal by James H. Smith from the decision of the Commissioner of the General Land Office of April 8, 1924, holding for rejection his application, 05880, presented in the exercise of an asserted preference right claimed under section 2348, Revised Statutes, to purchase the E.  $\frac{1}{2}$  SE.  $\frac{1}{4}$ , Sec. 4, T. 14 N., R. 1 W., W. M., Seattle land district, Washington, for conflict with what was held to be the superior right of purchase of Bernard H. Johnston under his prior application, 05864, filed under section 2347, Revised Statutes.

The entire SE.  $\frac{1}{4}$  of said Sec. 4, is embraced in the homestead entry, 056967, made by Smith July 28, 1916, with reservation to the United States of the coal deposit under the provisions of the act of June 22, 1910 (36 Stat., 583), and the application of Johnson was presented October 13, 1917, accompanied by the purchase price of the coal in the sum of \$1,600, the appraised value thereof. The application of Smith was filed October 28, 1918, and was based upon an asserted preference right of purchase by virtue of an alleged opening and improving of a mine of coal on the land October 8, 1917, and the filing of a declaratory statement December 4, 1917. Action on both of the said applications was suspended at the times of their presentation because of the then pending coal application, 01000, of Solomon Lauridsen and Henry Kamps covering said land, involved in a Government proceeding, which was not determined until March 24, 1924, when the application was finally rejected.

In his declaratory statement Smith alleges that—

I entered into possession of the surface of said tract on January 25, 1916, having made entry of the same under act of June 22, 1910, as a homestead, and have remained in actual possession of the same since said date; that on the 2d day of October, 1917, I commenced prospecting said land for coal; and since said date I diligently prosecuted work for the development of coal; that on the 8th day of October, 1917, I opened a valuable mine of coal on the land, which I improved as such; that in such labor and improvements I have expended the sum of fifty dollars, the labor and improvements being as follows: \* \* \* That the coal was exposed by a creek running through said land; that I caused to be driven upon said vein an open cut about 8 feet wide opening and improving a vein of good merchantable coal about 7 feet thick.

In his application to purchase Smith alleged that—

I have expended in developing coal mines on said tract, in labor and improvements, the sum of one hundred and fifty dollars, the nature of such improvements being as follows: One tunnel 8 feet wide at the top and 9 feet wide at the bottom, 7 feet high, lagged and timbered, and driven in on the coal vein underlying said land 12 feet and opening and improving a vein of coal about 7 feet thick carrying more than 6 feet of coal, so that said coal can now be mined from said mine.

The action of the Commissioner in holding Smith's application for rejection is based upon the stated ground that—

While declarant James H. Smith alleges that he opened and improved a coal mine on October 8, 1917, he did not file his declaratory statement until December 4, 1917, which was subsequent to Johnston's application, and at the date of the latter's application there was no adverse claim to the land other than the application of Lauridsen and Kamps. It must be held therefore that the application of Bernard H. Johnston was prior in time to that of James H. Smith.

The Department is unable to find any warrant in the facts recited in the quoted portion of the Commissioner's decision for his conclusion that the rights of Johnston with respect to the coal deposit underlying the land in question are superior to those of Smith, notwithstanding the fact that the filing of Johnston's application to purchase antedated by a period of 52 days the filing of Smith's declaratory statement. Smith is relying upon an asserted preference right of purchase alleged to have been initiated, in accordance with the provisions of section 2348, Revised Statutes, by the opening and improving of a mine of coal on land five days prior to the filing of Johnston's application, and the preservation or maintenance of such asserted preference right by the filing of his declaratory statement within the 60-day period prescribed by section 2349 which was succeeded in turn, in the fulfillment of the requirement of section 2350, by the timely filing of an application to purchase.

But Johnston, in his answer to Smith's appeal, directs attention to the fact that Smith alleged in his declaratory statement that he commenced prospecting the land for coal on October 2, 1917, and

urges that the 60-day period prescribed for the filing of the declaratory statement began to run from that date, as the one upon which he commenced his improvements on the land; that inasmuch as he failed to file the declaratory statement until December 4, 1917, or 63 days after the commencement of such work, the filing was out of time; that the default could not be cured in the presence of Johnston's then pending application. The Department is not impressed with the soundness of this contention. By section 2348, Revised Statutes, it is declared in substance that any person qualified as provided in section 2347 who has opened and improved a mine or mines of coal upon the public lands, being in actual possession of the same, shall be entitled to a preference right of entry under the preceding section. By section 2349 it is provided that all claims under section 2348 "must be presented to the register of the proper land district within 60 days after the date of actual possession and the commencement of improvements on the land, by the filing of a declaratory statement therefor." Construing these provisions, the Department in *J. T. Williams and John Blathran* (48 L. D., 176), said:

Section 2349, Revised Statutes, in connection with the preceding section, contemplates that the coal declaratory statement or notice setting up a preference-right claim must be presented within sixty days after the date of the inception of the preference right, that is to say, within sixty days after the date a mine of coal *has been opened and improvements on such mine commenced*, accompanied by actual possession of the land. [Italics supplied.]

Mere prospecting for coal on a tract as a preliminary to the opening of a mine thereon does not constitute the commencement of improvements contemplated by the law as construed by the Department in the decision cited, and hence the period covered by such preliminary prospecting can not be regarded as falling within the 60-day period during which a coal declaratory statement is required to be filed. It must be held, therefore, that, if, as in general terms alleged in Smith's declaratory statement, a mine of coal was opened on the land by Smith on October 8, 1917, the time within which a declaratory statement was required to be filed did not expire until December 7, 1917, and that the declaratory statement, which was filed on December 4, 1917, was in time. On the assumption, therefore, that Smith opened and commenced the improvement of a mine of coal on the land on the date named, he clearly acquired a preference right which was preserved by timely filing of a declaratory statement, and having presented his application to purchase on October 28, 1918, and within one year from the time prescribed for the filing of the declaratory statement, Smith's right of purchase was superior to that of Johnston.

The Department, however, is of opinion that the averments contained in the declaratory statement to the effect that Smith caused

an open cut about 8 feet wide to be driven upon a vein of coal, that was already exposed by a creek running through the land, "thereby opening and improving a *vein* of good merchantable coal about 7 feet thick," are too general and indefinite to establish the opening and improving of a mine of coal on the land, within the contemplation of the coal land laws, as construed by the Department in *McKenna v. Seymour*, on petition (47 L. D., 395), as of the date of the filing of his declaratory statement. Smith, therefore, will be afforded 30 days from the date of notice hereof within which to submit a verified and corroborated showing reciting in detail the facts relied upon by him as constituting the opening and improving of a mine of coal on the land. Should Smith, within the time allowed, submit a showing satisfactory on its face, Johnston will be called upon to show cause why his own application should not be rejected, and that of Smith permitted to proceed in the regular manner to entry and patent.

The decision appealed from is so modified, and the case remanded for appropriate action in harmony herewith.

**MARY T. JURGENS.**

*See Page 549*

*Decided July 30, 1924.*

**CULTIVATION—ENLARGED HOMESTEAD—STOCK RAISING HOMESTEAD—SECRETARY OF THE INTERIOR—SUPERVISORY AUTHORITY.**

A change in departmental regulations whereunder it is imperative to deny an application for the reduction of the required area of cultivation which could have been granted under the previously existing regulations is a function within the authority of the Secretary of the Interior conferred by the three year homestead act and does not deprive the applicant of any statutory right.

**FINNEY, *First Assistant Secretary:***

At the Denver, Colorado, land office on January 27, 1920, Mary T. Jurgens applied to make entry under the enlarged homestead act for NE.  $\frac{1}{4}$  and E.  $\frac{1}{4}$  NW.  $\frac{1}{4}$ , Sec. 29, T. 6 S., R. 69 W., 6th P. M. The application conflicted with a prior application, and was allowed on March 13, 1923, as to NE.  $\frac{1}{4}$  and SE.  $\frac{1}{4}$  NW.  $\frac{1}{4}$  (200 acres). The designation of the land under the enlarged homestead act became effective September 10, 1917, and its designation under the stock raising homestead act became effective June 10, 1919.

On April 21, 1924, entrywoman filed an application for reduction of the required area of cultivation, setting forth that only a small garden patch is cultivable, and that the land is only suitable for grazing purposes. The application was denied by decision of the Commissioner of the General Land Office dated May 16, 1924, and

entrywoman has appealed, contending that the Commissioner erred in invoking a regulation adopted since the entry was made to deny a statutory right which existed at the date of entry.

In amending section 2291, Revised Statutes, by the act of June 6, 1912 (37 Stat., 123), Congress, after making specific requirements as to cultivation, provided:

But the Secretary of the Interior may, upon a satisfactory showing, under rules and regulations prescribed by him, reduce the required area of cultivation.

The various revisions of "Suggestions to Homesteaders" (Circular No. 541) have contained statements of the conditions under which an application for reduction of the required area of cultivation could be granted. On February 1, 1924 (50 L. D., 260), the Department approved a recommendation of the Commissioner of the General Land Office that there be added to paragraph 27(b) of the edition of January 16, 1922, of the "Suggestions" (48 L. D., 389, 398) the following:

Nor will a reduction in the area of cultivation, based on the physical conditions of the land, be permitted if, at the date of the application to enter, the land was designated and subject to entry under the stock raising act. In such cases, the homesteader should file application for change of the character of the entry to one under the stock-raising act, showing therein the non-adaptability of the land for cultivation; that the land does not contain any water holes, or other body of water needed or used by the public for watering purposes, and his consent to the entry being made subject to the reservation to the United States of all coal and other minerals in the land, together with the right to prospect for, mine, and remove the same. The application of the entryman should be in affidavit form, and the showing therein as to the character of the land should be corroborated by the affidavits of two witnesses.

The denial of the application in question was based on the quoted paragraph.

Counsel is in error in contending that entrywoman became vested with a statutory right through anything contained in any edition of "Suggestions to Homesteaders."

The provision of the so-called three-year homestead law under which entrywoman is seeking a reduction of the required area of cultivation is merely a grant of authority to the Secretary of the Interior, to be exercised "upon a satisfactory showing." If it should be conceded that entrywoman was justified in relying on statements contained in the edition of "Suggestions to Homesteaders" which was current when her entry was allowed, it must also be admitted that if she failed to avail herself of such provisions—and she had ample time to do so prior to February 1, 1924—she is in no position to complain because prior to the date of her application—April 21, 1924—the Secretary of the Interior concluded to deny applications for reduction of the required area of cultivation, based on the physi-

cal conditions of the land, if at the date of the application to make entry the land had been designated as subject to entry under the stock raising homestead act.

The fact that entrywoman will be required to change the character of her entry and because thereof make certain improvements which she otherwise might avoid does not impress the Department as a hardship. She delayed in applying for reduction of cultivation, and her application must be disposed of under the instructions referred to by the Commissioner.

The decision appealed from is affirmed.

*see 512082*  
FRED C. BARRON.

*see instructions contained in S I O boxing circular, page 289*  
Decided August 2, 1924.

STOCK-RAISING HOMESTEAD—AMENDMENT—OCCUPANCY—SECRETARY OF THE INTERIOR—SUPERVISORY AUTHORITY.

The Secretary of the Interior may, in the exercise of his supervisory authority, permit a stock-raising homestead entry to be amended so as to embrace land wholly different from that originally entered, where it is satisfactorily shown that, through no fault of the entryman, the land is so far unfit for occupancy as to render it practically impossible to comply with the law relating thereto.

DEPARTMENTAL DECISION CITED AND APPLIED.

Case of Loyd Wilson (48 L. D. 380), cited and applied.

FINNEY, *First Assistant Secretary*:

This appeal has been filed by Fred C. Barron from the decision of the Commissioner of the General Land Office of April 23, 1924, rejecting his application to amend his stock-raising homestead entry (Del Norte 05081), made May 4, 1921, and embracing the S.  $\frac{1}{2}$ , Sec. 11 and S.  $\frac{1}{2}$ , Sec. 12, T. 39 N., R. 11 E., N. M. P. M., Colorado.

The land applied for in the application to amend is a wholly different tract, namely, Sec. 24, T. 39 N., R. 11 E., N. M. P. M.

In his application to amend, and as ground therefor, the entryman alleges:

No mistake was made in the numbers of the land applied for, but a serious mistake was made in location. Since I filed on this land, the country west of it and covering the road to this land is covered with waste water for a width of about one mile for from three to five months in each year. This water originates in irrigation ditches in the country north and west of my land and as this land in my vicinity is the very lowest part of the San Luis Valley and the water gathers in there from the west and north. The volume of water coming in there is growing steadily year by year and it is so heavy now that during the summer months I can not get to or from my claim. If it keeps on increasing in volume it will eventually flood my present land

and make it of no value for any purpose. I was not aware of this condition at the time I filed on my land. I am now asking that I be permitted to transfer my filing to Sec. 24, T. 39 N., R. 11 E., N. M. P. M., for the reason that it is higher land and will not flood as the low lands to the west of it hold the water. Further, there is a public highway in and out from Sec. 24 which gives a road that is always available.

Since the entryman did not seek to retain any portion of the land embraced in his original entry, the application to amend was held by the Commissioner not allowable, but, upon the showing made, it was held that a second entry, embracing the land sought in substitution, would be allowable, provided certain conditions were met. The entryman has appealed.

The Department does not concur in the finding that the facts alleged by Barron do not justify allowance of his application to amend. Section 10 of Circular No. 423 (44 L. D., 181) reads, in part:

\* \* \* in the exercise of its equitable power and authority, the department will grant amendment of an entry, made for the purpose of securing a home upon the public lands, or for the purpose of effecting reclamation in accordance with the provisions of the desert land law, in any case where it is satisfactorily shown that, through no fault or neglect of the entryman, the land embraced by his entry is so far unfit for, or insusceptible of, occupancy, cultivation, or irrigation, as to render it practically impossible to perform the requirements of the law thereon.

While it is true this case does not come strictly within the wording of this regulation, it is nevertheless so far within its spirit as to justify allowance of Barron's application. In the case of Loyd Wilson (48 L. D., 380, 381), it was held that—

10333  
\* \* \* it has been long settled that the Secretary of the Interior has, through the exercise of the power given by section 441 of the Revised Statutes to supervise the Government's business relating to public lands, the inherent or incidental power to sanction in his discretion, the amendment of entries of any kind on equitable grounds, and for the purposes not only of correcting mistakes but to prevent unmerited loss or hardship on the part of the entryman, and it is well settled that he has that power independent of any statute specifically authorizing such amendments. William A. Calderhead (36 L. D., 446), paragraph 10 of instructions of April 22, 1909 (37 L. D., 655, 657). And it has been repeatedly held that that power should be liberally exercised and not abridged, particularly by technical rules or in cases where entries have been made, as in this case, through misinformation given entrymen, or for similar reasons. Crail Wiley (3 L. D., 429), Samuel Meek (18 L. D., 213), Josiah Cox (27 L. D., 389).

For the reasons above stated the decision appealed from is reversed.

**PACIFIC GAS AND ELECTRIC COMPANY, ASSIGNEE OF BRITTON.**

*Decided August 2, 1924.*

**REPAYMENT—MINERAL LANDS—MINING CLAIM—FRAUD.**


A mineral entry, the allowance of which was wrongfully procured by false and misleading evidence, subsequently canceled upon charges that the land was not valuable for minerals and that the requisite patent expenditures had not been made, is not an erroneously allowed entry within the purview of the repayment act of June 16, 1880, where the record was not obviously so incomplete and defective on its face as to warrant its denial in the first instance.

**FINNEY, *First Assistant Secretary:***

The Pacific Gas and Electric Company, assignee of John A. Britton, has appealed from the decision of the Commissioner of the General Land Office, dated April 3, 1924, denying repayment of the purchase money paid in connection with canceled mineral entry 03587 for the Haskins placer mining claim, embracing the NW.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , Sec. 3, T. 23 N., R. 7 E., M. D. M., Sacramento land district, California.

The entry was made on May 12, 1905, by John A. Britton and by mesne conveyances title passed to the applicant company, as is shown by the abstract of title submitted. Adverse proceedings were directed upon charges in substance that the land was not valuable for minerals and that the requisite patent expenditures had not been made. A hearing was had at which the entryman was represented by counsel but no evidence on his behalf was introduced. The charges were held to have been sustained and thereupon the entry was canceled by the Commissioner on September 21, 1908. By application dated November 17, 1908, Britton sought repayment which was denied by the Commissioner on March 16, 1911, for the reason that it appeared that the entry was not erroneously allowed on the proofs presented but was wrongfully procured by false and misleading evidence.

Upon the present appeal it is contended that the *ex parte* proof was insufficient and should not have been accepted, especially the showing as to the buildings being conducive to the development of the claim. It is pointed out that the Commissioner in his decision of September 21, 1908, stated that the buildings were not valid mining improvements and could not be taken into account in the estimation of the expenditures. It is urged that the statements of the Commissioner to the effect that the proofs were misleading and that the showing was found to be untrue are absolutely unwarranted.



The proofs filed before entry showed that the Haskins claim was wholly a placer mining claim and that gold had been discovered and extracted therefrom. The affidavits of expenditures set forth four shafts valued at \$130; a frame building for a dwelling house, tool house and blacksmith shop, 14 feet by 32 feet and 20 feet high (said dwelling house being necessary for the operation of said mining claim) of the value of more than \$350; also a wagon road 640 feet long and 12 feet wide, a portion of which, 300 feet in length, was on the claim and valued at \$100, and 340 feet on adjacent ground valued at \$150, all of said road being continuous and absolutely necessary for getting machinery, timber, etc., to the mining claim, used for that purpose solely and to be used continuously in mining operations. The showing as to the placer character of the land and as to expenditures was duly corroborated and was accepted as sufficient by the local officers. They allowed the application for patent to proceed and in due time entry was made. The sufficiency of the proofs when received in the General Land Office was not questioned. It was the evidence developed at the hearing that brought about the cancellation of the entry. Had it not been for the field investigation, adverse report and trial, so far as is now made to appear, the entry would have been approved and passed to patent.

The claimant's showing as to the character of the land, and the class and value of his mining improvements was made with the purpose and design that it should be accepted as sufficient to entitle him to entry and patent. After a hearing, at which the entryman was represented, but offered no evidence on his own behalf and as a result of which the proofs were found to be incorrect and misleading, it does not lie in the mouth of such entryman or those claiming under him to say that the proofs submitted by him were wholly inadequate and insufficient to justify the entry. The Department will not be overnice or technical in viewing such proofs in order to discover possible defects. The entry record, having been treated as good and sufficient by the two tribunals below, in the first instance, will not be considered inadequate in connection with this application for repayment, unless it is obviously so incomplete and defective on its face as not to warrant the entry. The proof here involved does not fall in that category.

As above stated the *ex parte* proofs were accepted as sufficient by the local officers and the entry was allowed. They stood unquestioned before the Commissioner. The presumption as to regularity which

attends official action within the scope of the officer's power and authority must prevail unless the contrary clearly and convincingly appears. Irregularities and defects in the proof are not so apparent in this case. The Commissioner has twice, in connection with the repayment applications, expressly declined to find or conclude that the entry was erroneously allowed on defective proofs. Upon the record submitted, the Department is not prepared to say that the Commissioner was in error in that regard.

It is quite clear that a toolhouse and a blacksmith shop when necessary and utilized for mining operations are available as patent expenditures. The circumstance that such a building is also designated as a dwelling house necessary for the operation of the mine will not preclude its due availability, where good faith on the part of the claimant is present. The wagon road, a portion of which was upon the claim and the remainder of which was on adjacent land, used exclusively in connection with the location, was not necessarily subject to rejection as a mining improvement. A wagon road and a trail may be acceptable in satisfaction of patent expenditures. *Emily Lode* (6 L. D., 220), and *Tacoma and Roche Harbor Lime Company* (43 L. D., 128).

It follows that repayment can not be granted under the provisions of the act of June 16, 1880 (21 Stat., 287), because the entry was not canceled for conflict with some superior right and it was not erroneously allowed.

It is urged that repayment should be permitted under the act of March 26, 1908 (35 Stat., 48), no fraud being shown and the questions involved being matters of judgment and estimations, so it is asserted. The Commissioner properly denied repayment under said act because the present application, filed on January 12, 1924, was not presented within the period of two years after the passage of the amendatory act of December 11, 1919 (41 Stat., 366). It is also suggested that John A. Britton, when he filed the former application, was the agent and acting for the applicant company. According to the record presented, Britton filed the application in his own interest and not on behalf of the company. There was nothing disclosed which indicated that the company was then interested in or claiming under the entry. That application could not operate to toll the two-year limitation of the statute, in favor of the company.

No sufficient reason has been pointed out and none otherwise appears for not sustaining the denial of the repayment application. The decision of the Commissioner appealed from is affirmed.

## GREAT WESTERN COAL MINES COMPANY.

Decided August 6, 1924.

## REPAYMENT—COAL LANDS—FRAUD—RELINQUISHMENT.

The repayment statutes are not to be deemed to offer an option to a claimant either to defend against charges involving actual fraud and protect his claim or to relinquish the land and take instead the purchase price.

## COAL LANDS—ALIENATION—VESTED RIGHTS—PAYMENT.

Equitable title to coal lands entered under section 2347 *et seq.*, Revised Statutes, does not vest in the entryman until the laws and regulations shall have been fully complied with, including payment of purchase price, and until that time alienation of the lands is without lawful effect.

## REPAYMENT—COAL LANDS—FRAUD—RELINQUISHMENT—EVIDENCE—PRESUMPTION—BURDEN OF PROOF.

Where a coal entry is canceled upon a relinquishment filed during the pendency of adverse proceedings based upon a charge of fraud it will be presumed that the purpose of the relinquishment was to avoid the issue and to dispose of the charge without adjudication upon the ultimate merits, and an applicant for repayment of the purchase price under the act of March 26, 1908, must assume the burden of proof and establish a *prima facie* case as to absence of fraud.

## DEPARTMENTAL DECISION DISTINGUISHED.

Case of George F. Goodwin (43 L. D., 193), distinguished.

FINNEY, *First Assistant Secretary*:

This is an appeal by the Great Western Coal Mines Company from the decision of the Commissioner of the General Land Office dated January 25, 1924, denying the company's application for repayment of the sum of \$16,600, being the purchase price for coal lands entered by Richard L. Bird, its grantor.

The record shows that on February 6, 1920, Richard L. Bird, pursuant to section 2347, Revised Statutes, filed his coal-land application 025342 for NE.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , S.  $\frac{1}{2}$  SE.  $\frac{1}{4}$ , Sec. 20, and NE.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ , Sec. 29, T. 13 S., R. 8 E., S. L. M., Salt Lake City, Utah, land district. Therein the applicant upon oath stated that he made the application in good faith for his own benefit, and not, directly or indirectly, in whole or in part, in behalf of any other person or persons whomsoever. On June 8, 1920, the application was rejected by the local officers for failure to file proof of posting and publication of notice. On January 10, 1921, the Commissioner directed that a new notice be issued and that the applicant promptly proceed. In March, 1921, the proofs were filed, and in April and May three per cent of the purchase price was paid. After an extension of time duly granted the balance of the purchase price was paid on September 15, 1921, and on that day coal entry certificate was issued. According to the abstract of title furnished, Bird and his wife on October 29, 1921, transferred the land to the Great Western Coal Mines Company by

warranty deed for the recited consideration of one dollar. On the same day the company mortgaged a part of the land with other tracts to secure a bond issue of \$600,000, and by an amended trust deed, dated February 27, 1922, apparently the balance of the land was included in such mortgage.

This application and others for lands adjacent were investigated by the field service. Adverse proceedings were directed against the entry on March 19, 1923, upon the charge which, as amended on April 10, 1923, was in substance that the coal filing and claim was not made in good faith by the applicant with the intent that the legal title should be acquired for himself, but with the purpose and intent that the title should inure to the use and benefit of the Cedar Mesa Farm Company, a disqualified corporation, or to the Great Western Coal Mines Company, or to some corporation or association formed by the applicant and the officers and stockholders of the Cedar Mesa Farm Company. The charge was denied, and a hearing was ordered. Depositions were taken at Provo, Utah, on April 23, 1923, and at Price, Utah, on April 24, 1923, both the Government and the entryman being represented. No further testimony was adduced. On April 25, 1923, Bird and the Great Western Coal Mines Company executed relinquishments of the entry, which were filed in the local office on April 28, 1923, and on that day transmitted to the Commissioner. On June 4, 1923, the chief of field division reported that the hearing in the case was closed by relinquishment. On June 29, 1923, the Commissioner canceled the coal entry pursuant to the relinquishment.

On July 3, 1923, Bird filed his application for repayment accompanied by an abstract of title, the purchase price receipts, and duplicate of the relinquishment. On October 2, 1923, repayment was denied by the Commissioner on the ground that the absence of fraud in the attempt to gain title had not been established, the act of March 26, 1908 (35 Stat., 48), and the case of the Cumberland Mining and Smelting Company (46 L. D., 433) being cited. It was further stated that Bird was not shown to be entitled to repayment, he having conveyed the land to the company.

On November 3, 1923, the Great Western Coal Mines Company filed its application for repayment, as the legal representative of the entryman, Bird. The application was denied on January 25, 1924, "on the merits of the case, in accordance with the views expressed" in the decision of October 2, 1923. The present appeal followed, in which it is contended that there was no fraud involved in connection with the coal application, and that none can be shown. It is also urged that it was error to attribute or impute fraud in the making of the coal land application.

In his affidavit of March 17, 1924, which is filed with the appeal, Richard L. Bird makes the following allegations:

That said entry was relinquished in said Government proceedings because of the representation of James A. Ramsey, then agent in charge of hearings at Salt Lake City, Utah, that if a relinquishment of this entry was filed and this tract included by amendment in the application for Coal Lease Serial No. 032029 of the Great Western Coal Mines Company, the then owner of the land, the Field Service would recommend both the allowance of the coal lease, and also repayment of the purchase money which had been paid. In accordance with this understanding, and relying upon the Government's representations and promises, your affiant, on April 28th, 1923, with the consent of the Great Western Coal Mines Company, which was also fully acquainted with said agent's promises and representations, filed a relinquishment of his aforesaid entry, and also caused the Great Western Coal Mines Company to also file a relinquishment thereof, and at the same time to file an amended coal application to lease, including the tract embraced in said relinquished coal entry.

That had it not been for said promises and representations of said agent of the General Land Office aforesaid, no relinquishment would have been filed, either by affiant, or the Great Western Coal Mines Company, but it was considered the advisable thing to do at that time to avoid further litigation with the Government, as apparently the company would benefit thereby, should the Government's promises be carried out.

The affidavit is corroborated by George A. Storrs, formerly president of the now dissolved Cedar Mesa Farm, Incorporated, and also president of the Great Western Coal Mines Company.

No report or statement by the agent with regard to relinquishment and repayment is found with the record. It would seem remarkable, to say the least, that the special agent would undertake to make the representations which are attributed to him. There is no claim made that the representations set forth were in any way authorized or approved by any official of the Land Department and particularly by either the chief of field division or by the Commissioner of the General Land Office. No application for repayment was filed with the relinquishment, but such application was delayed for over two months and until after the adverse proceedings were closed and the entry canceled.

The officers of the coal company undoubtedly knew, or had good reason to believe, that a searching and exhaustive investigation had been made before the adverse proceedings were instituted on behalf of the Government. The very gist of the charge made against the entry is fraud and bad faith. The taking of evidence proceeded for two days. The testimony adduced tended to show that the funds obtained to finance the proposed Great Western Coal Mines Company were solicited, prior to the coal entry, on the basis that the company would own the Cedar Mesa Farm lands and would own or control the coal lands to the west and northwest of said farm

land. The tracts included in Bird's entry lie adjacent and in a northwest direction from the farm, but none of the witnesses had talked with Bird or, so far as appears, knew of his coal application. Thus the Government was beginning to lay the foundation of its case and develop its evidence when the proceeding was halted by the execution of the relinquishment. Obviously the relinquishment was given to stop the litigation. In the face of a charge such as is above set forth and the trial actually proceeding, the presentation of a relinquishment would indicate a strong desire on the part of the defendant to avoid the issue and dispose of the matter without an adjudication upon the ultimate merits. Why an application for repayment was not promptly filed does not appear. It may be remarked that Bird's repayment application was dated and executed on April 25, 1923, which is the date on the relinquishment, but that application was not filed for over two months.

The act of March 26, 1908 (35 Stat., 48), under which this application for repayment must be adjudicated, authorizes repayment where an entry has been rejected and "neither such applicant nor his legal representatives shall have been guilty of any fraud or attempted fraud in connection with such application." In the case of the Cumberland Mining and Smelting Company, on petition (46 L. D., 433), the Department held that the applicant for repayment must bring himself within the purview of the above provision of the statute, and that it was incumbent upon him to establish the fact that neither the entryman nor his legal representative had been guilty of any fraud or attempted fraud. The case of the Union Land Company, assignee of Allen (46 L. D., 116), involved coal lands included in a general compromise under which certain patents and entries were annulled and canceled and others confirmed. The suits and proceedings pending were based on fraud. In the compromise agreement no specific mention was made as to repayment or fraud. Repayment was sought on the ground that there had been no finding of fraud and no waiver of repayment. The Department held that the stipulation concluded all matters and was a final settlement of all claims. In the case at bar there was no stipulation, but under the circumstances of this case and for reasons somewhat analogous, the merits of the case of the canceled coal entry should not be deemed open for consideration at this time upon this *ex parte* repayment application. The coal entry was properly allowed upon the proofs presented, and if at the trial it had been shown to be valid and regular, the entry would have been sustained and passed to patent, notwithstanding the charge preferred. Instead of defending the entry, the claimant saw fit to release the land and later to ask repayment. The repayment statutes are not to be deemed

to offer an option for a claimant either to defend against charges involving actual fraud and protect his claim, or to relinquish the land and take instead its purchase price. The waiver of a claim under a pending charge of bad faith is so close to an acknowledgment of the truth of the accusation that the Department is not warranted in assuming that repayment is authorized. The record before the Commissioner, in the opinion of this Department, justified the denial of repayment in this case.

The showing now made in the *ex parte* affidavits tends to establish the absence of fraud or bad faith, but it is not deemed of such force as to wholly avoid the effect of the relinquishment during the course of the trial. Under the circumstances and conditions appearing in connection with this application, the Department is unable to find that the applicant company is shown to be entitled to repayment.

The contention of the appellant to the effect that after application but prior to the completion of proof and payment the coal land applicant can legally sell or agree to convey the land he seeks is not well founded. The statute (section 2347 *et seq.*, Revised Statutes) prescribes that a qualified person shall have the right to enter coal land upon application and upon payment of the requisite purchase price. The area subject to appropriation is definitely limited, and only one entry by the same person is authorized. Equitable title to and a vested interest in coal land does not arise until the law and regulations are fully complied with, including payment of the purchase price. Thereafter the applicant may lawfully convey the land but not before. The Land Department is entitled to know who is the real beneficiary of the entry and to that end the coal regulations require that the application must be made in good faith for the claimant's own benefit. That status must continue and obtain until the completion of the application by proof and payment. The coal law is not in this respect like the timber and stone act of June 3, 1878 (20 Stat., 89), wherein the showings to be made in the claimant's initial filing, or application, and later in his proofs are definitely set forth, and the requirement specified in the law, it has been held, can not be expanded by regulations. *Williamson v. United States* (207 U. S., 425).

The case of *George F. Goodwin* (43 L. D., 193) is cited as controlling here. Repayment under a canceled lode entry was there involved. Charges of nondiscovery and insufficient expenditures had been made and denied. Later the claimant asked leave to withdraw his answer and consented to the cancellation of the entry. Thereupon the application was rejected. In denying repayment the Commissioner cited and relied upon the statements contained

in adverse reports. This the Department held was not proper because the withdrawal of the claimant's answer at most constituted only an admission of the truth of charges contained in the notice served, and not a confession that the statements in the reports were true. In that decision it was also stated that the charges made and in legal effect admitted did not necessarily include bad faith or fraud on the part of the claimant and that the questions of discovery and of patent expenditures in many cases were matters of judgment upon which various minds might honestly reach diverse conclusions. It was specifically held that the particular charges admitted did not convict the claimant of bad faith or fraud.

Here the charge is of a different character and, as before stated, includes bad faith and fraud. A trial pursuant to such charge was under way when the relinquishment was filed. It is true that there was no withdrawal of the answer, nor was there presented for the benefit of the record any reason or explanation on the part of the applicant for his relinquishment. That action must speak for itself. The Department is not prepared to concede that the Goodwin case, *supra*, is determinative in connection with the disposition of this matter. The Goodwin case was itself remanded to the General Land Office for further consideration, with the direction that if the Commissioner deemed any investigation or a hearing with respect to the applicant's good faith necessary the same might be had.

In the appeal it is asked on behalf of the applicant that if there is any doubt as to the good faith of the parties interested in this case a hearing be granted pursuant to the rule laid down in the case of Thomas J. Keogh (42 L. D., 28). That case involved a timber and stone application adversely reported and relinquished in the face of charges. Repayment was denied, but opportunity was afforded Keogh to make a showing and request a hearing, the case thereafter to be further adjudicated.

As hereinbefore indicated, upon the record considered by the Commissioner, his denial of repayment is deemed proper. The decision appealed from must accordingly be affirmed without prejudice to the company's privilege formally to apply for and have a hearing upon the matter of bad faith and fraud or attempted fraud in connection with the coal-land entry of Bird and to show the facts attending the execution of the relinquishment. The burden will be upon the company as the moving party to make out a *prima facie* case to support the application for repayment. The field service will be duly advised, and some representative will appear and be prepared to protect the interests of the Government. Upon the record made at such hearing, if one be had, the repayment application will be again considered and readjudicated.

## LIABILITY FOR TIMBER CUT FROM RIGHTS OF WAY FOR TELEPHONE, TELEGRAPH, AND POWER TRANSMISSION LINES.

*Instructions, August 9, 1924.*

### TIMBER CUTTING—RIGHT OF WAY—STATUTES.

While the act of March 4, 1911, which grants rights of way over the public lands for telephone, telegraph, and transmission lines, does not expressly authorize the cutting of timber from a right of way, yet such right must be implied as a necessary incident to the right of use and occupancy of the easement.

### TIMBER CUTTING—RIGHT OF WAY—DAMAGES—WORDS AND PHRASES.

The term "full value," as used in the departmental regulations of January 6, 1913, relating to payment for timber cut on public lands in the construction, maintenance, and operation of lines for which rights of way are granted pursuant to the act of March 4, 1911, is to be construed as meaning the entire stumpage value of the standing trees.

### TIMBER CUTTING—RIGHT OF WAY—PAYMENT.

Moneys paid by grantees under the act of March 4, 1911, for timber cut from their rights of way should be deposited in the Treasury as funds arising from the sale of public lands and not to the "account of depredations upon public lands."

### TIMBER CUTTING—RIGHT OF WAY—PAYMENT.

A grantee under the act of March 4, 1911, who cuts timber from lands within its right of way necessary for the construction and operation of the line, becomes, upon payment for the timber, the owner thereof with full authority to dispose of it as it chooses.

### FINNEY, *First Assistant Secretary*:

By your [Commissioner of the General Land Office] letter of June 17, 1924, you in effect ask the following questions:

1. Does the act of March 4, 1911 (36 Stat., 1235, 1253), which grants rights of way for telephone, telegraph, and power transmission lines, require payment for timber taken by the holders of such easements from lands embraced in their respective rights of way?

2. What is the meaning of the words "full value" used in the pertinent regulations issued under that act?

3. How should payments for timber so taken be made and deposited in the Treasury?

4. Has a grantee under that act the right to "use, give away, or otherwise dispose of the timber upon the said right of way which it has been necessary to remove in the construction, operation and maintenance of the line"?

The part of the act pertaining to this consideration authorizes the granting of—

\* \* \* an easement for rights of way, for a period of not exceeding 50 years from the date of the issuance of such grant, over, across, and upon the public lands, national forests, and reservations of the United States for electrical poles and lines for the transmission and distribution of electrical

power, and for poles and lines for telephone and telegraph purposes, to the extent of 20 feet on each side of the center line of such electrical, telephone, and telegraph lines and poles, to any citizen, association, or corporation of the United States, where it is intended by such to exercise the right of way herein granted for any one or more of the purposes herein named.

The regulations of January 6, 1913. (41 L. D., 454), declare in part as follows:

Reg. 13. The grantee shall clear and keep clear all lands owned or controlled by the United States along the lines for which right of way is granted to such width and in such manner as the officer of the United States having supervision of such lands may direct.

Reg. 14. The grantee shall, to the satisfaction of the officer last above described, dispose of all brush, refuse, or unused timber on lands owned or controlled by the United States caused by or left from the construction and maintenance of the lines for which right of way is granted.

Reg. 15. The grantee shall pay on demand, by certified check to the order of the Secretary of the Interior, the full value as fixed by the said Secretary for all timber cut, injured, or destroyed on lands owned or controlled by the United States in the construction, maintenance, and operation of the lines for which right of way is granted.

A comparison of this act with kindred acts shows that it differs from them in that it is silent as to the free use of timber, and that it does not grant the right to take timber for the purpose of construction from adjacent lands under any circumstances, as do some of the acts making grants.

While the right to cut timber from the right of way is not expressly given by statute the grantees under that act have that right as a necessary incident to the right of use and occupancy of the land which is especially given.

From this it necessarily follows that your first question must be answered in the affirmative.

In answer to your second question you are informed that in the opinion of this Department "full value" to be paid is the entire stumpage value of the standing trees.

There does not appear to be any reason why the payments mentioned in your third query should not be made through your office in the same manner in which moneys arising from compromise of timber trespasses are made; but inasmuch as moneys paid by grantees under this act are closely related to the funds which arise from the sale of public lands they should be deposited in the Treasury accordingly and not to the "account of depredations upon public lands."

In answer to your fourth and last question I will say that after a grantee of the right of way has paid the Government for timber necessarily cut, the timber becomes his property and he may make such disposition of it as he may choose to make; but it should be

borne in mind that, as regulation 13, *supra*, appears to contemplate, the width and extent to which a right of way may be cleared is to be fixed by the proper officer of the Government, and it therefore follows that if the grantee cuts timber that is not necessary to the construction and proper operation of his line he will do so as a trespasser and would not under such circumstances have the ownership or right of disposal of the timber so cut.

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**ARMSTRONG v. McKANNA (ON REHEARING).**

*Decided August 11, 1924.*

**OIL AND GAS LANDS—PROSPECTING PERMIT—AGENT—DILIGENCE.**

So long as an oil and gas permit stands in the name of a permittee, he alone is responsible to the Department for compliance with its drilling requirements, and if his operating agent, or his drilling contractor, is not complying with the terms of the permit, the duty devolves upon the permittee to enforce such compliance, and his diligence will be tested by his efforts in that direction.

**OIL AND GAS LANDS—PROSPECTING PERMIT—AGENT—DILIGENCE—EXTENSION OF TIME.**

A permittee who enters into a contract with a drilling contractor in terms which preclude him from enforcing drilling within the time prescribed in the permit will not be granted an extension of time within which to commence drilling on the plea that lack of diligence should be attributed to the contractor and not to the permittee.

**OIL AND GAS LANDS—PROSPECTING PERMIT—EXTENSION OF TIME.**

A drilling contract made contingent upon the success of, or to follow a test well to be drilled elsewhere on a structure, is not such a contribution to the test as to warrant an extension of time under the act of January 11, 1922.

**FINNEY, *First Assistant Secretary*:**

By decision dated June 3, 1924, the Department affirmed the action of the Commissioner of the General Land Office in denying to Ervin S. Armstrong a second extension of an oil and gas prospecting permit issued to him, pursuant to section 13 of the leasing act of February 25, 1920 (41 Stat., 437), on June 30, 1922, for certain lands in the Kettleman Hills structure, Visalia, California, land district, and canceled his permit. This action was taken on the ground that a drilling contract with one, J. S. Alcorn, offered by the permittee, was not one which insured early development of the land, or which became effective as stipulated therein by departmental approval of an assignment as therein provided, and did not constitute diligence within the purview of the act of January 11, 1922 (42 Stat., 356).

A motion for rehearing has been filed by Ervin S. Armstrong in which he claims that the default under the permit is chargeable to

the drilling contractor; that cancellation of the permit is a penalty upon him for the default of another; that the decision is one directly opposed to the previous policy of the Department and should not be applied to him, as he relied on the alleged previous policy and practice; and, finally, that this contract, and others like it, should be considered as contributions to test wells on a structure, which contributions should be regarded as evidence of diligence within the meaning of the extension act of January 11, 1922, *supra*, in the same manner as have substantial contributions of money to the cost of such wells.

So long as a permit stands in the name of a permittee, he alone is responsible to the Department for compliance with its drilling requirements. If his operating agents, or his drilling contractor, are not complying with the terms of the permit, the duty is upon the permittee to enforce such compliance, and his diligence will be tested by his efforts in that direction. Here it is conceded by Armstrong that he made a contract which, in his opinion at least, precluded him from enforcing drilling within the time prescribed. At the same time he points out that the contractor agreed "to protect the permit."

Assuming that the contract was not susceptible of enforcement, the claim of this movent that defaults under the permit were through matters over which he had no control seems ill founded. The Government is entitled to expect that permittees who are awarded exclusive rights to occupy portions of the public domain, and to test for oil in anticipation of the reward offered for a discovery, will use reasonable diligence and discretion in contracting for the drilling of such areas, and in enforcing such contracts. In this case nothing was done, or attempted to be done, by the permittee until after default and after the validity of the permit had been drawn into issue.

As to the claim that a new policy and practice was adopted without warning to this movent, it seems only necessary to point out that the Department's action *affirmed* that of the Commissioner, to whom the duty of granting extensions in the first instance has been delegated. The Department's instructions of June 3, 1924 (50 L. D., 546), referred to as showing such change, and in which the decision in this case was mentioned, made no change in the matter of the diligence to be required of permittees, but related solely to the matter of the restoration of lands after permits have been canceled for want of diligence by the permittees.

The claim that drilling contracts, which are made contingent upon the success of, or to follow a test well to be drilled elsewhere on a structure, are contributions to such test which warrant ex-

tensions of time to the permittees so contracting, can not be approved or recognized as in harmony with the purposes of the leasing act.

The now-admitted relationship of the permittee and contractor in the present case discloses a situation which such a practice would foster. Armstrong admits that in contracting with Alcorn they both understood that the real party in interest was the Coast Land Company, a subsidiary of the Marland Oil Company. The contract provided for a test well upon the structure, and outside the area covered by the permit, *before* drilling would be commenced on the land in said permit. Were this contract recognized as a contribution to such test, as contended for by Armstrong, no reason exists why the same company, through the same or other officers and agents, could not enter into similar contracts with all the permittees holding permits on the structure, or such of them as were best located thereon, and by so doing monopolize the field and tie up development for a long period. Such a practice clearly violates the purpose of the act, which is to *encourage* development, as well as contravenes the spirit if not the expressed limitation provision of section 27 of said act, which is designed to render monopolies unlawful.

The diligence contemplated by the act of January 11, 1922, requires something more than mere paper transactions, whereunder a permittee is enabled to hold a prospecting permit and secure the benefits of a lower royalty and preference right to a lease, although the area, before his drilling commenced, has been proved to be within the known geologic structure of a producing field, and would otherwise be subject to lease at public auction to the highest bidder and at a higher royalty, in accordance with section 17 of the leasing act. The views expressed by this movent would make the true purport of section 17 of the leasing act be that only such areas could be leased under the conditions more favorable to the public as were, at the date of the leasing act, within known producing structures; for it is a matter for judicial notice that whenever drilling is commenced in an unproven field all the available public domain is invariably sought by prospecting-permit applicants long before the test well is completed.

The power to prescribe regulations, and the discretion in granting and extending permits, vested in the Department by the leasing act and the act of January 11, 1922, *supra*, are to be exercised in furtherance of the purposes of said acts, and must be, and have been, so employed in the matters complained of by this movement.

The motion for rehearing is denied.

## ALBERT T. HALL.

Decided August 11, 1924.

See Page 645

and Page 137

## STOCK-RAISING HOMESTEAD—IMPROVEMENTS—FINAL PROOF—CONTEST.

Failure to comply with the provision in the third proviso to section 3 of the stock-raising homestead act, specifying that at least one-half of the required improvements shall be placed upon the entry within three years from the making thereof, while a sufficient ground of contest, yet, in and of itself, will not be held such a default that the Department must upon its own initiative cancel the entry.

## STOCK-RAISING HOMESTEAD—IMPROVEMENTS—FINAL PROOF.

Where at the time of submission of final proof upon a stock-raising homestead entry improvements to the extent of \$1.25 per acre had not been placed upon the land, and ample time remained within the statutory life of the entry to make the required improvements, withdrawal of the proof may be allowed and the entry permitted to remain intact, subject to the submission of new proof, at the proper time.

(3)

FINNEY, *First Assistant Secretary*:

On September 3, 1920, Albert T. Hall made additional stock-raising homestead entry 018674 for the SW.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , Sec. 4, NE.  $\frac{1}{4}$ , N.  $\frac{1}{2}$  NW.  $\frac{1}{4}$ , SE.  $\frac{1}{4}$  NW.  $\frac{1}{4}$ , NW.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , N.  $\frac{1}{2}$  SW.  $\frac{1}{4}$ , SW.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , Sec. 9, T. 14 N., R. 4 W., S. L. M., containing 480 acres, within the Salt Lake City, Utah, land district. Final proof was submitted November 19, 1923, but final certificate was withheld at the request of the chief of field division.

On March 29, 1924, the Commissioner of the General Land Office directed adverse proceedings against the entry on the ground that permanent improvements to the value of at least \$1.25 per acre, tending to enhance the value of the land for stock-raising purposes, had not been placed thereon.

In response to notice of the charge the claimant filed a request for additional time within which to place further improvements on the land. In a decision dated May 19, 1924, the Commissioner denied the request stating:

It appears that claimant made misleading statements in his final proof and as he failed to comply with the law as to improvements, his application for extension of time within which to place additional improvements on the land is hereby denied. You will so advise claimant and that he will be allowed 30 days from service of notice within which to apply for a hearing. In event he fails to take such action he will have to suffer the cancellation of his entry for default.

The Commissioner had previously in his decision stated that it was shown by a special agent's report that the claimant attempted to claim credit for some fencing on his original homestead; that he could be allowed credit on his additional homestead only to the amount of \$197.34, while the law required improvements of the

value of not less than \$600; that the law requires that at least one-half of such improvements shall be placed upon the land within three years from the date of entry.

In place of applying for a hearing the claimant asked that he be allowed to withdraw his final proof; that later he be allowed to make a new final proof showing such additional improvements as required under the stock-raising homestead law; and that if the request could not be granted by the Commissioner the same be treated as an appeal. The case has accordingly come before the Department on appeal.

The only question now involved is as to the effect of the third and last proviso to section 3 of the stock-raising homestead law of December 29, 1916 (39 Stat., 862). Said proviso reads as follows:

That instead of cultivation as required by the homestead laws the entryman shall be required to make permanent improvements upon the land entered before final proof is submitted tending to increase the value of the same for stock-raising purposes, of the value of not less than \$1.25 per acre, and at least one-half of such improvements shall be placed upon the land within three years after the date of entry thereof.

The record indicates that the claimant did not place one-half of the required improvements on the land within three years from date of entry. Does that necessitate cancellation of this entry? The Department is not disposed to take that view. An allegation of failure to comply with law in this respect might be a sufficient ground of contest, when not shown by the records of the Land Department, but in and of itself, it will not be held such a default that the Department must upon its own initiative cancel the homestead entry.

This claimant will have ample time to place the necessary improvements upon the land and to make a new final proof within the statutory life of his entry. He will be allowed to withdraw the proof that he made and his entry will remain intact, subject to the submission of a new and satisfactory final proof within five years from the date of entry.

The decision appealed from is modified as hereinbefore stated.

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### ROYAL I. PELTS.

*Decided August 14, 1924.*

#### HOMESTEAD ENTRY—ADDITIONAL—ADJOINING FARM.

An adjoining farm entry for less than 160 acres is a proper basis for an additional entry under section 2 of the act of April 28, 1904, for an amount of land which added to the area of land embraced in the adjoining farm entry will not exceed 160 acres.

## DEPARTMENTAL DECISION CITED AND APPLIED—DEPARTMENTAL DECISION OVERRULED.

Case of Sarah E. Crow (42 L. D., 313), cited and applied; case of Jasper N. Wilkerson (41 L. D., 138), overruled.

FINNEY, *First Assistant Secretary*:

Royal I. Pelts has appealed from a decision of the General Land Office of May 20, 1924, affirming the action of the local officers in rejecting his application 018737 to enter, under section 2 of the act of April 28, 1904 (33 Stat., 527), the NW.  $\frac{1}{4}$  NE.  $\frac{1}{4}$  and NE.  $\frac{1}{4}$  NW.  $\frac{1}{4}$ , Sec. 20, T. 11 N., R. 22 W., 5th P. M., containing 80 acres, within the Little Rock land district, Arkansas.

On February 20, 1919, Pelts made entry, under the adjoining farm clause of section 2289, Revised Statutes, for the SE.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , Sec. 18, T. 11 N., R. 22 W., 5th P. M., contiguous to the W  $\frac{1}{2}$  SW.  $\frac{1}{4}$ , Sec. 17, said township and range, which last-mentioned tract contains 80 acres of land and constituted his original farm. The entry was amended on July 17, 1922, so as to embrace not only the said SE.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , Sec. 18, but also the NW.  $\frac{1}{4}$  NW.  $\frac{1}{4}$ , Sec. 20, T. 11 N., R. 22 E., 5th P. M., the entered tract comprising in all 80 acres. The entryman on January 23, 1924, submitted final proof on the entry, as amended, and on January 24, 1924, final certificate was issued. Patent No. 936107 was on April 9, 1924, issued for the said 80 acres of land.

Meanwhile, on March 13, 1924, the application 018737 was filed as additional to the adjoining farm entry, and for two legal subdivisions contiguous to one another, one of which was contiguous to the NW.  $\frac{1}{4}$  NW.  $\frac{1}{4}$ , Sec. 20, which was included in the adjoining farm entry as that entry was amended. The local officers rejected the application for the reason that "an adjoining farm homestead entry is not a proper or legal base for an entry under the act of April 28, 1904." The General Land Office, in the decision complained of, affirmed the judgment of the local officers, but therein it was stated that, if claimant filed an application as additional, under section 6 of the act of March 2, 1889 (25 Stat., 854), such application might be allowed, in view of the departmental decision of June 29, 1912, in the case of Jasper N. Wilkerson (41 L. D., 138). From the decision of May 20, 1924, Pelts has appealed.

In the decision complained of, it was concluded that this claimant exhausted his rights under section 2289, Revised Statutes, by reason of making the adjoining farm entry 015609 for 80 acres as additional to the original farm of 80 acres already owned by him, the two tracts together having made up the maximum acreage of 160 acres allowed to him thereunder. This conclusion was based upon reasoning to the effect that section 2289, Revised Statutes, limited the

area of land which might be acquired thereunder, in the case of an adjoining farm entry, to the difference between the area of land owned and 160 acres, whereas section 2 of the act of April 28, 1904, *supra*, permitted the enlargement to the maximum of 160 acres of an entry made under the body of section 2289, Revised Statutes, for less than that area.

The General Land Office holding finds support in the decision of the Department of June 7, 1912, in the case of Timothy Mahoney (41 L. D., 129), wherein it was held that the making of an adjoining farm entry for an amount of land which added to the original farm aggregated 160 acres exhausted the homestead right, and such entry could not be made the basis for a soldiers' additional entry of other lands. Section 2306, Revised Statutes, provides that a person who has had at least 90 days' military service during the War of the Rebellion, and who prior to June 22, 1874, made homestead entry for less than 160 acres, may make an additional entry (a soldiers' additional entry) for so much land as, when added to the quantity previously entered, shall not exceed 160 acres.

The decision of the Department of June 29, 1912, in the case of Jasper N. Wilkerson (41 L. D., 138), was referred to in the decision appealed from, as appears above. In that decision it was stated that, for the reasons set forth in the departmental decision of June 7, 1912, in the case of Timothy Mahoney, an adjoining farm homestead entry which had been made and perfected by Wilkerson exhausted his rights under the homestead law then in force, but it was concluded that Wilkerson's rights, at least to a limited extent, were restored by section 6 of the act of March 2, 1889 (25 Stat., 854), which was, it was recited, not an additional homestead entry law and was clearly distinguishable from acts which granted an additional entry. There was in the decision in the Wilkerson case no specific mention of section 2 of the act of April 28, 1904, *supra*, although reference was made in a general way to acts like that contained in section 2306, Revised Statutes, which grant an additional entry irrespective in some instances of whether the original entry was perfected and without requirement as to residence and cultivation upon the lands included within the additional entry. Thus clearly under the said decision the present application of Pelts could not be allowed. However, it will be observed that in this matter the decision in the Wilkerson case was predicated, entirely and without especial discussion, upon that in the Mahoney case; and if the last-mentioned decision were overruled the effect would be to render the first-mentioned decision of no value as a precedent for use in subsequent decisions upon the question of whether or not

an adjoining farm entry can be made the basis for an additional entry under the provisions of section 2 of the act of April 28, 1904, *supra*.

And the decision in the Mahoney case was overruled, recalled, and vacated by the departmental decision of August 5, 1913, in the case of Sarah E. Crow (42 L. D., 313), wherein it was held that an adjoining farm entry was a proper basis for a soldiers' additional entry of an amount of land which added to the area of public land embraced in the adjoining farm entry would not exceed 160 acres.

Section 2289, Revised Statutes, intends to allow an ordinary homestead entry to embrace 160 acres; or, in the case of a person owning and residing upon land, to allow such person to make a homestead entry for other lands contiguous to his said land, which shall not with the land so already owned and occupied exceed in the aggregate 160 acres. In such a case as is last described the entryman is given the benefit of being permitted to acquire title to the contiguous lands without the necessity of removing from the land which he owns and occupies and without the necessity of residence, cultivation, and improvement upon the contiguous lands embraced in the entry. It is considered that the whole 160 acres constitutes one farm or body of land, so that residence, cultivation, and improvement on behalf of a portion thereof is equivalent to residence, cultivation, and improvement on behalf of the whole. This, however, is no ground for the conclusion that under the law and regulations an adjoining farm homestead entry of less than 160 acres is with the original farm making up the 160 acres the equivalent of an ordinary homestead entry of 160 acres. If such a conclusion were correct, the present application of Pelts could not, of course, be allowed. But in the view of the Department there appears to be no logical basis for such a conclusion.

Following the line of reasoning of the decision in the case of Sarah E. Crow (42 L. D., 313, 314), it may be stated that it makes no difference under what particular form or class or character of entry the original entry 015609, made by Pelts, may fall, since the amount of public land embraced in that entry was 80 acres, he should be entitled to use that entry as the basis for an additional entry under section 2 of the act of April 28, 1904 (33 Stat., 527). There is no warrant in charging up to him, as a part of his homestead entry 015609, the land already owned by him at the time of making his original entry 015609 in determining his further right under said section 2 of the act of April 28, 1904.

The decision appealed from is therefore reversed and the record is returned to the General Land Office for appropriate action.

## STANDARD OIL COMPANY, ASSIGNEE OF LEE.

*Decided August 19, 1924.*

## SURVEY—OIL AND GAS LANDS—PROSPECTING PERMIT.

Where an oil and gas prospecting permit is issued for unsurveyed lands, the survey required by section 14 of the leasing act, when discovery is made, need not conform strictly to the rectangular surveys adopted under the general laws governing public-land surveys, but may be so made as to preserve the exterior boundaries of the claim.

## SURVEY—SECRETARY OF THE INTERIOR—OIL AND GAS LANDS—PROSPECTING PERMIT—LEASE.

The provision in section 14 of the act of February 25, 1920, that unsurveyed lands covered by a prospecting permit be surveyed at the expense of the permittee before a lease is awarded as a result of a discovery of oil or gas, authorizes the Secretary of the Interior to prescribe rules and regulations to govern the making of such surveys without regard to the general laws under which public-land surveys are made.

*First Assistant Secretary Finney to the Commissioner of the General Land Office:*

I have before me the request of resident counsel for the Standard Oil Company for instructions as to what procedure will be followed in the survey by the Department of the area in Alaska covered by a permit to prospect for oil and gas, Anchorage serial 04201, granted to William E. Lee and now held by that company, as assignee, in the event of a discovery of oil and an application for lease for all or part of the land.

This permit is for 2,500 acres, more or less, of unsurveyed land, but there appears to be certain conflicts with other claims outstanding, adjustment of which may reduce the area. This land was located and permit therefor issued with reference to magnetic north, rather than true north, and the precise question raised is whether the survey of this claim required by section 14 of the act, to be made by the Government at the expense of the permit holder, will be in terms of the rectangular surveys, under the general laws governing public-land surveys, or may be so made as to preserve the exterior boundaries of the claim, as they now lie, at variance with cardinal directions.

The company has submitted a plat showing a private survey which it has caused to be made, which purports to disclose the location of such rectangular legal subdivisions of the public-land surveys as will, if such surveys are extended, cover the land involved. Those smallest legal subdivisions which are cut by the exterior lines of the land under permit have been designated as lots. This method would preserve the original boundaries, and the only feasible alternative would be to adhere strictly to rectangular subdivi-

sions, awarding to each claimant having a common boundary line those forty-acre tracts or *rectangular* lots the greater portion of which lie within the original boundaries of the permit. Obviously, the latter involves an alteration of boundaries once established and the possibilities for reductions or excessive increases in acreage, with inevitable protests and contests between claimants when the awarding of an entire subdivision involves the taking from the claimant having the lesser area within a rectangular subdivision of acreage most favorably located upon a geologic structure. Such a rule would also necessarily make a greater restriction upon drilling of wells than that which appears in the permits, which prohibits, in certain instances, drilling of wells within 200 feet of the boundaries of lands covered by such permits.

These reasons impel me to direct that this company be permitted, when discovery is made, to apply for lease upon all the land covered by the permit or such portion as it may then be entitled to lease, furnishing as a description thereof the plat and field notes of its surveyor, and to further direct that upon a suitable deposit being made to cover the cost of a survey by the Department, such survey be made, dividing the lands within the limits of the permit into legal subdivisions of the public-land surveys, and lotting such subdivisions as are cut by the exterior boundaries of the lands then covered by the permit.

I note from the reply to the letter of inquiry in this case which you have submitted, and which is returned herewith, that you are of the opinion that only the rectangular surveys may be made, and that lots may not be created to preserve the original boundaries of permits issued for unsurveyed lands.

This view would be correct were the source of authority for making of these surveys the general laws governing the surveys of public lands, or, in other words, the laws governing "public land surveys."

Section 14 of the leasing act constitutes a departure from those laws and provides that the expense of survey shall be borne by the lease applicant. With respect to such surveys it provides:

The area to be selected by the permittee shall be in compact form and, if surveyed, to be described *by the legal subdivisions of the public land surveys*; if unsurveyed, to be surveyed by the Government at the expense of the applicant for lease *in accordance with rules and regulations to be prescribed by the Secretary of the Interior*, and the lands leased shall be conformed to and taken in accordance with the legal subdivisions of such surveys. [Italics supplied.]

From the foregoing it is clear that legal subdivisions of lands surveyed prior to permit under the laws governing "public land surveys" must be selected by a prospective lessee in accordance with legal subdivisions of such surveys, but it is also clear that as to

unsurveyed lands the area is to be surveyed, not in accordance with the laws governing public-land surveys generally, but "in accordance with rules and regulations to be prescribed by the Secretary of the Interior." This distinction was apparently made and discretion vested in the Department in recognition of the difficulties likely to arise after unsurveyed lands had been rendered valuable by discoveries of minerals and of the equities of the applicants for leases at whose expense such surveys will be made.

*Included so far  
as in conflict,*

54 L. O. 371  
**MIDLAND OILFIELDS COMPANY, LTD.**

*Decided August 20, 1924.*

**OIL AND GAS LANDS—PROSPECTING PERMIT—LEASE—STATUTES.**

Section 27 of the leasing act was designed to prevent monopolies of geologic structures and excessive holdings within any one State by any person, association, or corporation.

**OIL AND GAS LANDS—LEASE—STATUTES.**

Section 18 of the leasing act was only intended to afford relief to a class of claimants whose claims were initiated under preexisting laws, such relief to be personal, not to enlarge the rights of persons who had spent nothing until after the leasing act had been enacted and the original claimants had been awarded the leases.

**OIL AND GAS LANDS—LEASE—STATUTES.**

The provision in section 27 of the leasing act that nothing therein should be construed to limit section 18 thereof contemplated that the limitation in said section 27 as to the number of leases that might be acquired directly to three leases in a State should not prevent a qualified claimant under section 18 from acquiring a larger number of leases so long as such number does not exceed in the aggregate an area of 3,200 acres.

**OIL AND GAS LANDS—LEASE—ASSIGNMENT—STATUTES.**

The proviso to section 27 of the leasing act has reference solely to limitations upon qualified claimants under section 18 of that act and not to their assignees.

**FINNEY, First Assistant Secretary:**

I return herewith, without approval, your [Commissioner of the General Land Office] proposed telegram to the Midland Oilfields Company, Ltd., of Los Angeles, California, in which you express the view that section 27 of the leasing act will permit a corporation now holding three leases issued pursuant to section 14 of the act, to acquire by assignment one or more additional leases which issued pursuant to section 18 of the leasing act. This was stated to be due to the fact that section 27 of the act "does not apply to section 18 leases."

The provision of section 27 of the leasing act with respect to the number of leases to be held in a State is that "no person, asso-

ciation, or corporation shall take or hold at one time more than three oil or gas leases granted hereunder in any one State, \* \* \*." This is limited in the same section by the following proviso: "*Provided*, That nothing herein contained shall be construed to limit sections 18, 18a, 19, and 22 \* \* \*."

Under section 18 of the leasing act, persons, associations, or corporations who had initiated oil placer mining claims prior to July 3, 1910, for lands in California and Wyoming withdrawn by Executive order of September 27, 1909, and who were in possession of the lands undisputed by any other claimant prior to July 1, 1919, are entitled to leases of not to exceed in the aggregate 3,200 acres, unless the acreage sought would cover more than one-half a geologic structure having a total area of more than 640 acres. In that case the claimant may take only one-half the structure, but if the area is 640 acres he may acquire the entire structure. There is a further provision that no claimant who acquired an interest in the land after September 1, 1919, from another claimant who held more than the maximum area allowed to be leased under that section, 3,200 acres should be permitted to secure a lease thereon or any interest therein. All claims under this section were required to be filed within six months from the approval of the act. The final provision of that section is:

That no lease or leases under this section shall be granted, nor shall any interest therein inure, to any person, association, or corporation for a greater aggregate area or acreage than the maximum in this section provided for.

Section 18 is a relief section, which, it will be seen from its provisions, authorizes the issuance of leases to a described class of claimants found to have equities due to prior expenditures. The relief authorized is limited not only as to acreage, but as to the parties who may acquire interests. Those who were not, on or prior to July 1, 1919, in undisputed possession of mining claims for the lands were denied relief. Those who claimed under qualified claimants by lease, contract, or assignment were limited to an area equal to that allowed original claimants. The limitation on parties claiming under transfers executed after September 1, 1919, was clearly designed to prevent claimants of more than 3,200 acres, under conditions otherwise bringing them within the provisions of section 18 of the act, from selling such excess claims after the pendency of the leasing act, with such a provision for relief, became known, thereby acquiring, through sale of such claims, benefits in excess of that intended to be granted, and also to prevent the disposal of such surplus lands to the detriment of the Government, as they would otherwise revert to the United States and become subject to lease by competitive bidding and at advanced royalties.

Section 27 of the leasing act was designed to prevent monopolies of geologic structures, and excessive holdings within any one State by any person, association, or corporation.

From what has thus been shown to be the purposes of the two sections of the act, it is clear that section 18 was only intended to afford relief to a class of claimants whose claims were initiated under preexisting laws, and that such relief was intended to be personal, not to enlarge the rights of persons who had spent nothing until after the leasing act had been passed and the original claimants had been awarded the leases.

The provision in section 27 that nothing therein should be construed to limit section 18 meant that the limitation in said section 27 as to the number of leases which might be acquired directly to three leases in a State should not prevent a qualified claimant under section 18 from acquiring a larger number of leases so long as such number did not exceed in the aggregate an area of 3,200 acres.

To hold that leases issued pursuant to section 18 of the leasing act may now be assigned to parties holding the maximum number of leases (issued under other sections of the act) authorized by section 27 of the leasing act could result in the delivery over to one party, with no claim to equitable consideration, of an entire geologic structure, or such an area as to constitute or foster a monopoly, thereby defeating and overriding the expressed limitations contained in both sections, and in giving to an assignee, who had no equities, greater rights than the relief claimant under section 18 was accorded. The proviso to section 27 of the act referred solely to limitations upon qualified claimants under section 18, not assignees of leases issued to them. Had it referred to the latter as well, the reasonable and logical means of so stating would have been to provide that the limitations of this section relate only to leases under sections 14, 17, and 20 of the act, rather than to make section 27 applicable so long as it did not *limit* section 18. As shown herein, proposed assignees of leases issued under that section would not be claimants under that section, and any limitation upon their interests could not limit section 18, under which all claims were required to be by any person, association, or corporation.

A similar question was presented with respect to section 19 permits and leases, and the Department ruled (regulations of March 11, 1920, 47 L. D., 437, 467) that—

Section 19 of the act of February 25, 1920, is construed to permit qualified assignees since October 1, 1919, to secure preference-right permits, but no such transferee will be permitted to hold permits exceeding 2,560 acres for such lands in the same geologic structure, *nor more than three times that area in the same State.* [Italics supplied.]

It is to be understood, however, that the final proviso to section 18 of the act recognizes the right of a lessee thereunder to assign his lease and the right of persons not disqualified under any of the provisions of the act to acquire by assignment such leases.

Nor must anything herein stated be construed to impair the right of a lessee under section 18 of the act from acquiring interests under sections 14, 17, and 20 of the leasing act to the number and amount allowed other claimants by section 27 of the act. As stated in said section 27, its provisions can not limit section 18, and no reason appears why a qualified lessee under that section should, because of his equities which were therein recognized, be denied the same standing as those who had no such equities.

The Department has wired the Midland Oilfields Company, Ltd., that it can not acquire by assignment an additional lease issued pursuant to section 18 of the leasing act.

*Meaning asked for*  
**JOSEPH E. McCLORY ET AL.**

*Decided August 22, 1924.*  
*Buffalo 020364-Section 4*  
*020364-Section 4*

**OIL AND GAS LANDS—PROSPECTING PERMIT—MINERAL LANDS—MINING CLAIM.**

The granting of an oil and gas prospecting permit precludes, as long as the permit is in force, the appropriation of the land for metalliferous minerals under the United States mining laws.

**PATENT—RESERVATION—LAND DEPARTMENT—OIL AND GAS LANDS—MINERAL LANDS.**

The fact that an applicant for a patent to public land consents to the insertion of a reservation in the patent does not authorize the Land Department, in the absence of a statute prescribing it, to incorporate such reservation therein.

**FINNEY, First Assistant Secretary:**

On April 11, 1923, Joseph E. McClory and seven other persons filed mineral application 020364 for the Old Glory gold placer mining claim, embracing the SE. 1, Sec. 4, T. 43 N., R. 82 W., 6th P. M., Buffalo, Wyoming, land district, based upon a location made September 10, 1921.

The application represents—

That the land applied for is placer ground containing deposits of placer gold not in vein or lode formation; that title is sought not to control water courses or to obtain valuable timber but in good faith because of the gold deposit therein; that while drilling a test well for oil or gas, and at approximately a depth of 750 feet, placer gold was discovered, running in values from \$17.57 to as high as \$1,437.51 per ton, according to careful assays and tests made as more fully appears by affidavits and certificates filed herein, and to which reference is hereby made.

The applicants consent—

to accept title to said mining claim with the reservation and subject to the right of any permittee under any permit which has been or may be granted where the right of such permittee was initiated prior to the location of said placer mining claim, and also subject to the right of any lessee having a prior right under any lease of the land which has been or may be granted, to use so much of the surface of the land as is or may be necessary in prospecting for, mining, and removing the oil and gas contents and deposits therefrom without compensation for such use, and in accordance with section 29 of the leasing act of February 25, 1920.

On December 9, 1920, oil and gas permit was issued to C. L. Sackett covering, among other lands, the above-described tract. The term of this permit has been extended and it still remains in force. On June 9, 1923, within the period of publication of the application for mineral patent, Sackett filed a protest against the same. The local officers treated the protest as an adverse claim. The Commissioner of the General Land Office held that the protestant was not asserting his claim under the United States mining laws, and therefore his protest could not be treated as an adverse claim under sections 2325 and 2326 of the Revised Statutes. The protest, however, was considered as such by the Commissioner and he held that there was no provision in the leasing act of February 25, 1920, which permits the disposal of the title to the land covered by such a permit and whatever minerals they might contain; that the allowance of the mineral entry "would negative the provisions of said act wherein the exclusive right to prospect for oil and gas is given the permittee" and, hence, the land was not subject to appropriation under the United States mining laws. The application was therefore rejected. The applicants for mineral patent have appealed.

The appellants do not contend that it was error to refuse to treat the protest filed as an adverse claim under sections 2325 and 2326 of the Revised Statutes, and the Department finds none in such action. "The parties are not rival mining claimants and to such only the law on the subject of adverse claims applies." *Lindley on Mines*, Sec. 720; *Creede and Cripple Creek Mining and Milling Company v. Uinta Tunnel Mining and Transportation Company* (196 U. S., 337, 360).

The conclusion of the Commissioner that the lands covered by an oil and gas permit are not subject to appropriation under the United States mining laws, if correct, is controlling and decisive in this case and no other question raised on appeal, nor matters alleged in the protest need be considered.

The Commissioner finds support for his views in certain provisions of the first section of the leasing act of February 25, 1920, which reads:

That deposits of coal, phosphate, sodium, oil, oil shale, or gas, and lands containing such deposits owned by the United States, \* \* \* except as hereinafter provided, shall be subject to disposition in the form and manner provided by this act.

It is necessary therefore to inquire whether or not the granting of an oil and gas permit upon certain lands and the deposits named in the act is such a mode of disposition thereof, as to preclude or suspend, while the permit is in force, the appropriation of the land in the permit area for metalliferous minerals under the United States mining laws. Section 13 of the leasing act under certain conditions specified therein, gives the exclusive right, for a period of two years, to prospect for oil or gas upon lands containing the deposits named in the act. Under that section and the supplementary act of January 11, 1922 (42 Stat., 356), the term of the permit may be extended for a period not exceeding three years, upon a proper showing of diligence. The permit issued under this section stipulates that it is granted for no other purpose than to prospect for oil or gas. The oil and gas permittee has no general or exclusive right to the use of the surface for any purpose, but only the right to the use of so much of the surface as will enable the permittee to carry on without hindrance his oil and gas prospecting operations in accordance with the terms of the permit. The leasing act and the permit issued thereunder provide for the joint and contemporaneous use of the land by claimants of other deposits named in the act, and the provisions of the stock-raising homestead law of December 29, 1916, and the complementary provisions of the act of July 17, 1914 (38 Stat., 509), and those in the leasing acts, *supra*, provide under the conditions and reservations therein specified for the disposal of the title to agricultural entrymen. The grounds for rejecting an entry under the mineral land laws can not therefore be based upon any exclusive right of the oil and gas permittee to the possession of the surface.

Such permit is however granted in contemplation of a future lease for a part or all of the land in case of discovery. Hence, it is necessary to treat the land embraced in a prospecting permit as if embraced in an oil and gas lease with a reservation to the United States "to lease, sell, or otherwise dispose of the surface of the lands embraced within such lease under existing law or laws hereafter enacted, in so far as said surface is not necessary for the use of the lessee in extracting and removing the deposits therein" pursuant to section 29 of the leasing act. William R. Brennan (48 L. D., 108).

Under the provisions of the leasing act, the permittee unquestionably has the right during the life of his permit to pursue his explora-

tions for the purpose of converting by discovery his inchoate, inceptive right to a vested right in and to the oil or gas he may produce under the provisions of a lease thereafter granted. It follows, therefore, that no other person should be permitted, nor are they entitled, to initiate under other laws, rights which would by the provisions of such laws mature into a title without a reservation of the oil and gas deposits. "The patent of a placer mining claim carries with it the title to the surface included within the lines of the mining location, as well as to the lands beneath the surface." *Deffebach v. Hawke* (115 U. S., 392, 406). Based upon the provisions of section 2333 of the Revised Statutes, there is a well-recognized exception to this rule in the doctrine relating to known conflicting lode claims existing at the date of the application for patent (20 L. D., 204; 48 L. D., 521, 523). The Department, however, is not aware of any other statutory authority for any other exception. A patent to the applicant for a placer mining claim would carry title to the surface of the land and everything it contained and would, if issued, defeat the permittee's inchoate rights to the oil and gas deposits.

The fact that the particular applicant consents to a reservation of the oil and gas in his patent would not authorize the insertion of such a reservation therein. The land officers, who are merely agents of the law, have no authority to insert in the patent any other terms than those of conveyance, with recitals showing a compliance with the law and the conditions it prescribes, *Deffebach v. Hawke, supra*, and the exception of the statute can not be extended by those whose duty it is to supervise the issuing of patent (*Sullivan v. Iron Silver Mining Company*, 143 U. S., 431, 441), and these terms are not open to negotiation or agreement. The patentee has no voice in the matter. Neither can the Land Office enter into any agreement upon the subject. *Burke v. Southern Pacific Railway Company* (234 U. S., 669, 709), and cases there cited.

Inasmuch as a mineral patent, without an oil and gas reservation, would carry the title to the oil and gas contained in the land so conveyed and would thus defeat the permittee's inchoate rights to such oil and gas, and as there is no warrant of law for the insertion of such a reservation in the mineral patent, the Commissioner's decision must be, and is hereby, affirmed. While the effect of this decision seems to bar the exploration and purchase under the mineral land laws of metalliferous minerals contained in lands covered by a subsisting permit in good standing, yet the Department is without power in the absence of appropriate legislation to hold otherwise.

## GEORGE McINALLY.

*Decided August 25, 1924.**See page 161*

## REPAYMENT—TIMBER AND STONE—COAL LANDS—WITHDRAWAL.

The allowance of a timber and stone entry for land subsequently withdrawn under the act of June 22, 1910, for its coal contents, is not an erroneous allowance within the purview of section 2 of the repayment act of June 16, 1880, where the entry, allowed upon the strength of a sworn statement that the land was chiefly valuable for its timber, was canceled because the land was found to be more valuable for grazing purposes.

## DEPARTMENTAL DECISION CITED AND APPLIED.

Case of Olive M. Harrison (50 L. D., 418), cited and applied.

FINNEY, *First Assistant Secretary*:

The Commissioner of the General Land Office has submitted to the Department the application of George McInally for repayment of \$410 paid in connection with his entry under the so-called timber and stone law, embracing W.  $\frac{1}{2}$  SE.  $\frac{1}{4}$  and E.  $\frac{1}{2}$  SW.  $\frac{1}{4}$ , Sec. 13, T. 28 S., R. 68 W., 6th P. M., Pueblo, Colorado, land district.

The sworn statement was filed August 21, 1906; final proof was submitted December 6, 1906, and final certificate issued January 9, 1907. Under date of September 19, 1907, a special agent submitted an adverse report on the entry, and on April 14, 1910, the Commissioner of the General Land Office directed proceedings upon three charges: First, that the land is not chiefly valuable for the timber and stone thereon; second, that the land is chiefly valuable for coal; and, third, that the application was made with fraudulent intent. A hearing was had, resulting in a decision by the local officers that the first two charges had been sustained, but that the third charge had not been established. No appeal was filed, and the entry was canceled October 6, 1913.

While the entry was pending all the land in the township was withdrawn from entry under the coal land laws, and by departmental order of April 2, 1909, the township was withdrawn from all forms of entry. The tract entered by McInally was included in Coal Land Withdrawal Colorado No. 13 by Executive order of October 14, 1915.

To entitle McInally to repayment it must appear, as provided by section 2 of the act of June 16, 1880 (21 Stat., 287), that the entry was erroneously allowed and could not have been confirmed.

When the entry was made the land was not withdrawn from entry under the timber and stone law. McInally represented that the land was valuable for timber, and the local officers accepted his statements as true.

The hearing in this case occurred after the approval of the act of June 22, 1910 (36 Stat., 583), the proviso to section 1 of which follows:

That those who have initiated nonmineral entries, selections, or locations in good faith, prior to the passage of this Act, on lands withdrawn or classified as coal lands, may perfect the same under the provisions of the laws under which said entries were made, but shall receive the limited patent provided for in this Act.

If it had been developed at the hearing that the only objection to the entry was the presence of the coal deposits, the entryman could have availed himself of the benefits of the quoted proviso and secured a limited patent. But the hearing disclosed that, aside from its value for the coal deposits, the land was more valuable for grazing and dry-farming purposes than for the timber thereon. Hence the entry was canceled without any reference to the act of 1910.

What was said by the Department in the case of Olive M. Harrison (50 L. D., 418), is applicable to the case under consideration. It was there held:

In order for a repayment claim to be properly allowable under the provision in section 2 of the act of June 16, 1880, for repayment in cases where an entry has been erroneously allowed and can not be confirmed, two conditions must concur. In addition to being incapable of confirmation, the entry must have been erroneously allowed in the first instance. In the instant case it is pointed out that the entry, having been made for land which was afterwards included in a coal withdrawal, was not subject to confirmation as having been made for mineral land; that when it was abandoned in 1907 there existed no law under which it could have been confirmed as to a surface patent. However, the entry was not erroneously allowed. Such expression clearly refers to an error on the part of the Government in its allowance. Upon the proofs submitted, the local officers correctly allowed the entry. Where, as in this case, an entry is properly allowed upon the proofs submitted by the entryman, but is thereafter canceled because it has been otherwise ascertained that the land is not of the character represented in the proofs, the right to repayment under the act of June 16, 1880, does not exist. See William H. Irvine (28 L. D., 422). Said act makes it a prerequisite to the allowance of an application for repayment that it must appear that the entry was erroneously allowed, a condition which does not appear in the instant case. See William E. Creary (2 L. D., 694).

As McInally's entry was not erroneously allowed, no authority for repayment exists. The application for repayment must therefore be, and is hereby, denied.

**JOSEPH C. BRINGHURST ET AL.**

*Decided September 6, 1924.*

**SCHOOL LAND—INDEMNITY—SELECTION—SURVEY—WITHDRAWAL—RESERVATION.**

All withdrawals and reservations in effect when the plat of survey of a granted school section is accepted defeat, at least temporarily, the grant to the State which has the right to delay the selection of indemnity to such

time as it may see fit, but if the withdrawal or reservation is vacated prior to the filing of an indemnity selection the State must take the land in place.

DEPARTMENTAL DECISIONS CONSTRUED.

Case of State of California (32 L. D., 346), which distinguished and refused to follow the case of State of California (20 L. D., 327), was vacated by the case of State of California (37 L. D., 499), which was adhered to in the case of State of New Mexico (46 L. D., 396).

GOODWIN, *Assistant Secretary*:

Under date of August 1, 1924, in response to your [Commissioner of the General Land Office] letter of July 24, 1924, the Department advised you that four entries allowed under the provisions of the reclamation act of June 17, 1902 (32 Stat., 388), embracing lands in Sec. 16, T. 8 S., R. 1 E., S. L. M., Utah, were properly allowed, and that the legislation suggested by you was not necessary.

By letter of August 20, 1924, you called attention to the fact that a withdrawal referred to by the Department in its instructions of August 1, 1924, pertained to the Strawberry Reservoir, and not the Utah Lake Reservoir. The matter has accordingly been reconsidered.

The fractional NW.  $\frac{1}{4}$ , said Sec. 16, was withdrawn as a part of the Utah Lake Reservoir site prior to the acceptance of the plat of survey of said section on November 29, 1912. The SW.  $\frac{1}{4}$  and E.  $\frac{1}{2}$ , said Sec. 16, were withdrawn February 29, 1912, under the second form of withdrawal authorized by the act of June 17, 1902, *supra*, in connection with the Strawberry Valley project, which withdrawal was changed to the first form on April 16, 1913. The entries referred to were made after the filing of the farm-unit plat, and patents have issued under three of the entries.

You expressed the opinion that so much of each of the entries as embraced any portion of said Sec. 16 outside the fractional NW.  $\frac{1}{4}$  was illegal, based on your opinion that the E.  $\frac{1}{2}$  and SW.  $\frac{1}{4}$  passed to the State as a part of its grant of lands for the support of common schools under section 6 of the act of July 16, 1894 (28 Stat., 107), contending that a second-form withdrawal does not constitute such a reservation within the meaning of the act of February 28, 1891 (26 Stat., 796), amending sections 2275 and 2276, Revised Statutes, as serves to except lands in a granted school section from the operation of the grant. You cited the instructions of April 9, 1920 (47 L. D., 361, 365).

A full history of the act of February 28, 1891, *supra*, is set forth in the case of the State of California (23 L. D., 423). The Department has heretofore, in several instances, considered the effect of the act on lands withdrawn prior to survey.

In *ex parte* State of California (20 L. D., 327), the Department held on April 13, 1895:

It is not necessary that the reservation of said section 16 be of a permanent character to justify indemnity selection made by the State, for under the ruling in the case of *ex parte* Battlement Mesa Forest Reserve (16 L. D., 190), lands embraced within a temporary order of withdrawal of lands from settlement or selection by the Department, with the view of creating a forest reservation, excludes from selection by the State the lands so reserved, pending final action by this Department, gives to, or confers upon, the State (while the basis of lands in place is suspended from selection pending an examination of the lands temporarily reserved) the unquestionable right to make selection of other lands, for school purposes, equal in acreage to the tract so reserved.

But, by decision of December 10, 1903, in *ex parte* State of California (32 L. D., 346), the Department refused to be guided by the decision of April 13, 1895, *supra*, and held that the mere inclusion of Secs. 16 and 36 within a withdrawal made for the purpose of permitting investigation and examination of the lands withdrawn, with a view to their possible inclusion in a forest reserve, does not afford a base for the selection of school indemnity lands.

However, by decision of March 18, 1909 (37 L. D., 499), the effect of a temporary forest withdrawal was again considered, and it was held (page 501):

Upon informal inquiry at your office it has been ascertained that on March 2 of the present year the land assigned as base for the selection involved herein was included in the enlarged Shasta National Forest. It will thus be seen that the base land was temporarily withdrawn December 13, 1904, and for more than four years thereafter remained in that condition. To hold that for a period of more than four years, during which time the desirable public lands in the State were being rapidly disposed of, the State must remain passive and await the final action of the land department of the Government respecting lands which are temporarily withdrawn, is to impose upon the State conditions which it is believed are wholly inequitable, and not at all compatible with the meaning of section 2275, as amended.

It is undoubted that while a temporary withdrawal exists lands embraced therein are not subject to disposal under any of the public land laws, and if, while so withdrawn, the lands are surveyed and thereafter placed in a permanent reservation, it is not believed that the State would acquire any right to school sections involved until the reservation embracing them should be finally extinguished.

In view of the facts, the long period during which the base lands were embraced within the temporary withdrawal, and their subsequent inclusion in the permanent reservation, the Department is disposed to remand the case for adjudication in accordance with the present status of the base lands; and in such adjudication, your office will be in no way controlled by the decision of December 10, 1903, *supra*.

The decision last quoted from was cited with approval in the decision of May 28, 1918, in *ex parte* State of New Mexico (46 L. D., 396), in which land reserved for Indian purposes and upon

which were located several fourth-section Indian allotments was tendered by the State as base for a lieu selection. The Department there held that such lands were acceptable base, although it had not been determined whether they would be permanently reserved for Indian purposes.

In the instructions of April 9, 1920, cited by you, the Department held:

In the nomenclature and administration of the public-land laws a distinction is often observed between a "withdrawal" and a "reservation." The word withdrawal has generally been used to denote an order issued by the President, Secretary of the Interior, Commissioner of the General Land Office, or other proper officer, whereby public lands are withheld from settlement, sale, or entry under the general-land laws in aid of administration or because of some exigency or emergency, to prevent fraud, to correct surveys or boundaries or in order that they may be presently or ultimately applied to some designated public use or disposed of in some special way. The terms are often used interchangeably, but unquestionably many withdrawals have been made which could not properly be defined as reservations within the meaning of the act of February 28, 1891, *supra*. For instance, in the administration of the grants of public lands made to aid in the construction of railroads, Executive withdrawals are or were made either in advance of the definite location of the line or route of the road and for the purpose of preserving the land for the satisfaction of the grant or after such definite location and for the purpose of properly advising the local officers and others that the lands falling to the grant as well as those remaining to the United States have been identified, signifying that the granted lands have passed to the railroad company and the lands remaining to the United States are to be disposed of only at double the minimum price. Manifestly this is not a reservation of the lands in the true sense of that word.

It seems clear, however, in view of what has been said that in the great majority of cases in practical operation and effect a withdrawal and a reservation of public lands are identical. The question naturally arises then what is the criterion by which we may judge whether a withdrawal or reservation is within the meaning of that term as used in section 2275, Revised Statutes.

In the opinion of the Department the true test is whether the lands have been set aside in the interest of the public; that is, dedicated to some special use or designated for some particular purpose as, for example, where the withdrawal or reservation is in pursuance of a policy declared by Congress as one for which the public lands may be used. This obviously comprehends reservations under the act of 1910.

The Department does not wish to be understood as saying, however, that a withdrawal for mere purposes of classification or for irrigation would constitute a reservation within the meaning of the act of February 28, 1891. Such a withdrawal is in most cases manifestly in aid of administration and not a reservation of public lands for the use of the United States.

The authority for what are termed second-form withdrawals is contained in section 3 of the act of June 17, 1902, *supra*—

\* \* \* and the Secretary of the Interior is hereby authorized, at or immediately prior to the time of beginning the surveys for any contemplated irrigation works, to withdraw from entry, except under the homestead laws, any public lands believed to be susceptible of irrigation from said works: *Provided*, That all lands entered and entries made under the homestead laws within areas so withdrawn during such withdrawal shall be subject to all the provisions, limitations, charges, terms, and conditions of this Act.

Until June 25, 1910, unsurveyed land withdrawn under the second form was subject to homestead settlement. By section 5 of the act of that date (36 Stat., 835) Congress prohibited the settlement on or entry of lands withdrawn under the second form.

The effect of the act of June 25, 1910, *supra*, was apparently not taken into consideration when the Department, by letter dated November 25, 1912, addressed to Senator M. A. Smith, of Arizona, expressed the opinion that the mere inclusion of Secs. 2, 16, 32, and 36 in a second-form withdrawal is not such a reservation thereof as would afford a base for indemnity. Said letter quoted from the decision of December 10, 1903 (32 L. D., 346), which, as heretofore stated, the Department in its decision of March 18, 1909, *supra*, held was no longer controlling.

Experience has demonstrated that usually many years elapse after a reclamation project is initiated before it is determined what lands can be irrigated. In the case of the land in the Sec. 16 under consideration, the farm-unit plat was not filed until more than five years after the second-form withdrawal of February 29, 1912. Thus what was said by the Department in the decision of March 18, 1909, is peculiarly applicable—

To hold that for a period of more than four years, during which time the desirable public lands in the State were being rapidly disposed of, the State must remain passive and await the final action of the land department of the Government respecting lands which are temporarily withdrawn is to impose upon the State conditions which it is believed are wholly inequitable and not at all compatible with the meaning of section 2275 as amended.

After mature consideration the Department is of opinion that all withdrawals and reservations in effect when the plat of survey of a granted school section is accepted defeat, at least temporarily, the grant to the State, which has the right to delay the selection of indemnity to such time as it may see fit, and if the withdrawal or reservation is vacated prior to the filing of an indemnity selection, the State must take the land in place.

It is therefore again concluded that the entries referred to in your letter were properly allowed and that the legislation suggested is not necessary.

## RUDOLF BALKE.

*Decided September 10, 1924.*

## STOCK-RAISING HOMESTEAD—ADDITIONAL—APPLICATION—SURVEY.

One who has filed a complete application to make a homestead entry which is held suspended pending a segregation survey, is entitled to make an additional stock-raising homestead entry.

## DEPARTMENTAL DECISION CITED AND APPLIED.

Case of *Rippy v. Snowden* (47 L. D., 321), cited and applied.

GOODWIN, *Assistant Secretary*:

On May 22, 1908, Rudolf Balke filed a homestead application to enter, under section 2289, Revised Statutes, the E.  $\frac{1}{2}$  NW.  $\frac{1}{4}$  and E.  $\frac{1}{2}$  SW.  $\frac{1}{4}$ , Sec. 9 T. 16 S., R. 69 W., 6th P. M., Pueblo, Colorado, land district. It does not appear what action was taken on the application at the time of filing but subsequently serial No. 014114 was assigned to the same, and on June 17, 1911, the local officers rejected said application on account of the mineral character of the land. No appeal was filed.

On April 18, 1914, the Commissioner of the General Land Office reinstated the application, subject to Balke's filing a petition for segregation of mineral claims in conflict therewith. On May 22, 1914, Balke filed application 019114 to make an additional entry under the enlarged homestead act for the W.  $\frac{1}{2}$  NW.  $\frac{1}{4}$ , said Sec. 9, which was also partly covered by mineral entries. At the same time he filed a petition for segregation of all mineral claims involved. It appears that after the filing of these papers there have been unaccountably long delays in making any segregation survey.

On January 17, 1917, Balke filed application 031121 to make an additional entry, under the stock raising homestead law for the W.  $\frac{1}{2}$  SE.  $\frac{1}{4}$ , and SW.  $\frac{1}{4}$ , Sec. 1, W.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , and NW.  $\frac{1}{4}$ , Sec. 12, T. 17 S., R. 69 W., which was amended on January 12, 1918, to describe the SW.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , and SW.  $\frac{1}{4}$ , said Sec. 1, NW.  $\frac{1}{4}$ , NE.  $\frac{1}{4}$  NW.  $\frac{1}{4}$ , N.  $\frac{1}{2}$  SW.  $\frac{1}{4}$ , said Sec. 12. Petition for designation was filed with this application. On April 10, 1918, the local officers rejected said application for the reason that the original and first additional applications had not been allowed and there was no basis for an application for an additional stock-raising entry. The applicant filed a timely appeal. By decision dated July 30, 1918, the Commissioner advised the local officers that pending the filing in their office of the approved plat of resurvey applications 014114

and 019114 would of necessity remain suspended. He also rejected application 031121 stating:

The only provisions of the stock raising homestead act (39 Stat., 862), which permit an entry to be made for a tract not contiguous to the land covered by the applicant's original entry are found in the first two provisos to section 3. As stated in paragraph 6 of the instructions of January 27, 1917 (45 L. D., 625), issued under said act, such an additional can be allowed only if the applicant has completed the required period of residence on his original entry or is in such position that he may complete that period within the next six months.

The original entries, not having been allowed, the applicant is not in a position to make the required showing and accordingly your decision rejecting the application was correct and is hereby affirmed.

Balke appealed in due time from the Commissioner's decision and the papers were transmitted to the Department on August 18, 1919. Decision on the appeal has been withheld to await a resurvey.

The land involved in Sec. 9, T. 16 S., R. 69 W., was designated as subject to entry under the enlarged homestead act on October 13, 1920, effective November 10, 1920. All the land applied for by Balke was designated under the stock-raising homestead act on October 16, 1919, effective November 4, 1919. Plat of resurvey of Sec. 9, T. 16 S., R. 69 W., segregating the mineral claims from the agricultural land, approved August 8, 1923, and accepted by the Commissioner January 21, 1924, was filed in the local office on June 23, 1924.

Balke has alleged in corroborated affidavits that he established residence on the land first applied for in June, 1908, and has since maintained such residence and complied with the requirements of the homestead law.

While it is true that Balke had no entry when he filed his application for additional stock-raising entry, yet he had done all that he could do and was merely waiting for the segregation survey. He had complied with all requirements of the homestead law so that he was ready to make final proof. The principle that was announced in the case of *Rippy v. Snowden* (47 L. D., 321), clearly applies in this case. It is therefore held that Balke was qualified to make an additional stock-raising homestead on January 12, 1918, when he filed his amended applications to make such entry.

The decision appealed from is reversed and the applications are herewith returned for action in accordance with the views herein expressed.

**ARMSTRONG LIVESTOCK COMPANY.<sup>1</sup>**

*Decided September 14, 1924.*

**HOMESTEAD ENTRY—STOCK-RAISING HOMESTEAD—PAYMENT—ACT OF JANUARY 27, 1922.**

The act of January 27, 1922, does not authorize the Secretary of the Interior to permit one to select and transfer payment to 640 acres designated under the stock-raising homestead act in exchange of an entry made under section 2289, Revised Statutes, for 160 acres.

*GOODWIN, Assistant Secretary:*

Pursuant to paragraph 5 of the regulations of March 22, 1922 (48 L. D., 595), the Commissioner of the General Land Office has submitted the application under the act of January 27, 1922 (42 Stat., 359), filed by Harry Armstrong *et al.*, trustees of the Armstrong Live Stock Company, a dissolved Montana corporation, transferee of William Marshall, requesting that the latter's homestead entry be changed from SW.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , E.  $\frac{1}{2}$  SW.  $\frac{1}{4}$ , and lot 7, Sec. 6, T. 17 N., R. 8 E., M. M., Montana (159.13 acres), to NW.  $\frac{1}{4}$ , E.  $\frac{1}{2}$  SW.  $\frac{1}{4}$ , W.  $\frac{1}{2}$  E.  $\frac{1}{2}$ , Sec. 33, T. 31 S., R. 33 E., W. M., lots 2 and 3, SW.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ , N.  $\frac{1}{2}$  SE.  $\frac{1}{4}$ , and SE.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , Sec. 4, T. 32 S., R. 33 E., W. M., Oregon (640.34 acres).

The receiver's final receipt and the register's final certificate under said entry issued December 6, 1906. The final certificate and entry were canceled June 23, 1909, as a result of proceedings instituted February 23, 1909. Marshall and his wife conveyed the land to Barton W. S. Armstrong, and the latter transferred it to the Armstrong Live Stock Company. The present applicants are trustees for the stockholders and creditors of said corporation, which has been dissolved.

After the cancellation of Marshall's entry, one Abram E. Bright made homestead entry for the land, and patent issued to him on June 21, 1913.

The abstract of title filed by applicants shows that the recorded relinquishment is acceptable.

The entry was confirmed under the proviso to section 7 of the act of March 3, 1891 (26 Stat., 1095), and its cancellation was erroneous. (Jacob A. Harris, 42 L. D., 611.) However, Marshall's entry was made under the provisions of section 2289, Revised Statutes, which limit entries thereunder to "one-quarter section" of unappropriated public land. The application in question seeks to change the entry to a tract of 640.34 acres, "subject to the reservation to the United States of all coal and other minerals in the land, together with the right to prospect for, mine, and remove the same."

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<sup>1</sup> See decision on rehearing, page 636.

To allow the application it would be necessary to change the character of Marshall's entry to one under the stock-raising homestead act, and nothing found in the act of January 27, 1922, *supra*, would warrant the Department in making such change. The latter act authorizes the Secretary of the Interior, in the class of cases described therein, "to change the entry and transfer the payment to any other tract of surveyed public land nonmineral in character, free from lawful claim, and otherwise subject to general disposition." The act is an addition to the section (2372) of the Revised Statutes relating to amendment of entries, and in effect provides for the amendment of an erroneously canceled final entry. In amending such an entry the Department must be governed in the matter of area, by the provisions of the law under which the entry was made, and can not "transfer the payment" (i. e., the fee and commissions) to an area which calls for the payment of four times the amount of commissions which are subject to transfer. The commissions collectible on the 640.34 acres applied for would be \$24.42, whereas in making the entry Marshall paid \$5.97 as commissions.

For the reason stated, the application in question must be, and is hereby, rejected, subject to the right of applicants to elect which subdivisions, aggregating approximately 160 acres, in compact form, they desire to secure under the application. Should applicants avail themselves of such right, final certificate and patent will issue to the said trustees, in the absence of objection not now appearing, if the provisions of paragraph 6 of the regulations of March 22, 1922, *supra*, are complied with.

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### ARMSTRONG LIVESTOCK COMPANY (ON REHEARING).

*Decided November 28, 1924.*

#### HOMESTEAD ENTRY—CONTIGUITY—ACT OF JANUARY 27, 1922.

An exchange of entry under the act of January 27, 1922, may be allowed for two or more incontiguous tracts subject to entry provided that none of the tracts is part of an area approximately equal to that embraced in the canceled entry.

#### HOMESTEAD ENTRY—APPLICATION—PRACTICE—ACT OF JANUARY 27, 1922.

An applicant for relief under the act of January 27, 1922, must exhaust his claim in one application unless the lands applied for lie in two land districts, in which event the practice will be in accordance with instructions of September 22, 1916 (45 L. D., 486).

#### FINNEY, *First Assistant Secretary*:

A motion for rehearing has been filed on behalf of Harry Armstrong *et al.*, trustees of the Armstrong Live Stock Company, a dis-

solved Montana corporation, transferee of William Marshall, in the matter of their application under the act of January 27, 1922 (42 Stat., 359), wherein the Department by decision of September 14, 1924 (50 L. D., 635), held that Marshall's canceled homestead entry, embracing approximately 160 acres in Montana, could not be changed to 640.34 acres of stock-raising land in the Burns, Oregon, land district, but that the applicants could elect which subdivisions, aggregating 160 acres, in compact form, they desire to secure under the application.

Counsel contends (1) that the fact that the land applied for has been designated as of the character contemplated by the stockraising homestead act entitles him to the change applied for, and (2) that if restricted to 160 acres he should be allowed to secure tracts which are not contiguous.

The first contention was discussed at length in the decision of September 16, 1924, and nothing set forth in the motion for rehearing convinces the Department that it would be warranted in allowing the entry to be changed to an area materially greater than that entered, even though the land sought has been designated as subject to entry under the enlarged or the stock-raising homestead act.

After mature deliberation the Department is of opinion that an application under the act of January 27, 1922, *supra*, may embrace two or more incontiguous tracts, provided none of the tracts is part of an area approximately equal to that embraced in the canceled entry and subject to entry. However, a beneficiary must exhaust his claim for relief in one application, unless the tract lies in two land districts, in which event the practice will be in accordance with Circular No. 505 of September 22, 1916 (45 L. D., 486).

Modified to agree with the foregoing, the decision of September 16, 1924, is adhered to, the motion for rehearing being denied.

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ALLEN E. SEDGWICK.

*Decided September 17, 1924.*

PRACTICE—CONTEST—WITNESSES—COSTS—OIL AND GAS LANDS—PROSPECTING PERMIT.

The assessment of costs in protest proceedings against oil and gas permits is to be governed by the second sentence of Rule 53 of Practice, which specifies that each party shall bear his proportionate share in the examination and cross-examination of witnesses.

## PRACTICE—OIL AND GAS LANDS—PROSPECTING PERMIT—PREFERENCE RIGHT—INTERVENTION.

Inasmuch as a protestant against an oil and gas permit occupies merely the position of an informant without a preference right, the Department may allow later protestants to appear and participate in the proceedings, even though the protestant first in time prosecutes his protest.

GOODWIN, *Assistant Secretary*:

Because of certain views and directions therein given I am unable to approve of your [Commissioner of the General Land Office] letter directing a hearing in protest proceedings ordered against oil and gas permit, Visalia 010101.

The payment and apportionment of costs in proceedings of this character should be governed by the second clause of Rule 53 of Practice (48 L. D., 246, 256), which provides:

In other cases each party must pay the cost of taking the direct examination of his own witnesses and the cross-examination on his behalf of other witnesses; the cost of noting motions, objections, and exceptions must be paid by the party on whose behalf the same are made.

After careful consideration of the reasons you assign for taxing all the costs against the losing party, I do not consider there is sufficient warrant as a matter of good administrative practice to depart from that rule. Furthermore, I do not see any good reason in this particular class of protests for denying later protestants the privilege of appearing and participating in the hearing ordered and offering any proper evidence they may have at command to establish their respective allegations, even though the protestant first in time prosecutes his protest.

You rightly state that a contestant under the circumstances will gain no right by his protest. The several protestants are mere informants without a preference right, one over the other, because of the order in time in which their protests were filed. The first protestant who, under the terms of your letter, is exclusively allowed to proceed may be negligent or unskillful in the presentation of his case, or he may not have at command evidence available to the later protestants to establish the charges. For these reasons I not only see no objection, but I believe it will be more conducive to the establishment of the facts and would afford equal opportunity to all protestants to permit them all to participate in the hearing ordered.

Notice, therefore, should be given to each of the protestants that he may appear and offer evidence at the hearing ordered, and at the same time he should be warned that if he should fail so to do the protest will be forthwith dismissed.

Your letter with the record is herewith accordingly returned with the suggestion that your letter be revised to conform to the foregoing views.

## KANAWHA OIL AND GAS COMPANY, ASSIGNEE OF JONES.

Decided September 23, 1924.

OIL AND GAS LANDS—PROSPECTING PERMIT—LEASE—ASSIGNMENT.

The restrictions of section 27 of the act of February 25, 1920, as to the number of leases or permits that may be held by one person upon a geological structure and to the limit of acreage that may be acquired in leases and permits, while not applicable to persons entitled to relief under section 19 of that act, nevertheless apply to transferees or assignees of prospecting permits or leases issued under the latter section.

PRIOR DEPARTMENTAL INSTRUCTIONS VACATED.

Instructions of April 23, 1921 (48 L. D., 96), vacated.

*First Assistant Secretary Finney to the Commissioner of the General Land Office:*

I return without approval the assignment by James R. Jones to the Kanawha Oil and Gas Company of oil and gas prospecting permits Cheyenne, serial 029699, for 802.10 acres, and permit 029702, for 1,902.97 acres, of land on the same geologic structure in Wyoming.

The described permits were issued under section 19 of the leasing act, and assigned to James R. Jones, with departmental approval, on September 27, 1923, for development purposes, as provided in the Secretary's instructions of April 23, 1921. Those instructions held, in effect, that section 27 of the leasing act did not limit the number of permits to be held by assignees of permits issued under section 19 of the leasing act, and provided that assignments of not to exceed five permits in any one State might be submitted for consideration and approval if it appeared that the development of remote, unproved territories could only be secured in that manner. These instructions were based upon an assumption that the limitations of section 27 of the leasing act did not apply to leases or permits issued pursuant to section 19 of the leasing act.

The limitations of section 27 are general in their application, and the provision considered as excepting from them section-19 leases or permits is "that nothing contained herein shall be construed to limit sections 18, 18a, 19, and 22." Section 19 of the act, and the other sections enumerated, are "relief" sections, designed to give special preferences and privileges to claimants who, because of prior possession and development work on claims initiated under the placer mining laws, were considered by the Congress as having equities with respect to the land claimed which should be recognized.

Obviously, the restrictions of section 27 of the leasing act, as to the number of leases or permits which may be held or the acreage

*Overruled so far as in conflict 54 L.D. 37*

which may be acquired in permits or leases, would, if applied to claims by persons entitled to "relief" by previous expenditures of time and money, "limit" section 19, and to that extent the limitations of section 27 of the act do not apply.

Transferees of placer claims, who acquired the claims after October 1, 1919, were not entitled to "relief" under section 19, as said relief is expressly limited to "any person who, on October 1, 1919, was a *bona fide* occupant or claimant of oil or gas claims, etc."

It seems clear, therefore, that persons seeking the approval of the assignments of permits issued under section 19 of the leasing act are not claimants under that section, for the "relief" desired to be given has been theretofore secured by the parties having the equities. The assignee's interests are separate from these equities and are limited, by section 27 of the act, to one lease or permit upon a geologic structure, and to not more than three such permits or leases in a State, at one time, and to indirect interests which, when considered in connection with direct interests, will make the assignee interested in not more than 2,560 acres on a geologic structure and not more than 7,680 acres in a State. This question was recently considered in instructions of August 20, 1924 (50 L. D., 620), in the matter of proposed assignments of leases issued under section 18 of the leasing act. As the instructions of April 23, 1921 (48 L. D., 96), are in conflict with the views now entertained, those instructions are hereby vacated.

It appears that James R. Jones acquired the permits in question under the instructions just vacated, and that they subsist as separate and distinct obligations as they have not been consolidated. The approval of the assignment of either permit will relieve him of excess holdings. The assignee will be informed that the assignment of only one of the two permits can be approved, and required to disclose its interests in other permits and leases under the leasing act for lands in Wyoming.

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## PROSPECTING PERMITS NOT TO ISSUE CONCURRENTLY UNDER ACTS OF OCTOBER 2, 1917, AND FEBRUARY 25, 1920.

*Decided September 23, 1924.*

### ~~SALINE LAND—PROSPECTING PERMIT—LEASE—RESERVATION—SURFACE RIGHTS.~~

The rights reserved by section 29 of the act of February 25, 1920, in lands under permit or lease are limited to disposals of the surface, that is, to nonmineral entries authorized by the acts of July 17, 1914, and December 29, 1916.

## POTASH LANDS—SALINE LAND—PROSPECTING PERMIT.

No authority exists for the issuance concurrently of a permit to prospect for potassium under the act of October 2, 1917, and of a permit to prospect for sodium under the act of February 25, 1920, for the same tract of land.

## POTASH LANDS—PROSPECTING PERMIT—PATENT—LEASE.

The act of October 2, 1917, provides that upon satisfactory showing of valuable deposits in lands embraced within a prospecting permit issued thereunder, a patent shall be issued for one-fourth of the land covered by the permit, and the provision in section 2 of the act restricting further disposals of the remaining lands to leases clearly contemplates that the right of the permittee to an unlimited patent should be restricted only by prior disposals under acts which authorize the issuance of such patents.

## DEPARTMENTAL DECISION CITED AND APPLIED.

Case of Joseph E. McClory (50 L. D., 623), cited and applied.

FINNEY, *First Assistant Secretary*:

I refer to your [Commissioner of the General Land Office] recent note expressing doubt as to whether prospecting permits may be concurrently issued under the act of October 2, 1917 (40 Stat., 297), and the act of February 25, 1920 (41 Stat., 437), for the same land. The question arose as to lands alleged to be valuable both for potassium and sodium, and, as the occurrence of both minerals in the same area is not uncommon, the question is one of considerable importance.

The act of October 2, 1917, relates to lands valuable for potassium, while the act of February 25, 1920, is applicable to lands valuable for sodium and certain other minerals. The purposes of the acts are the same, to encourage prospecting and development of lands valuable for these deposits, and to provide for the disposal of such deposits through leases. In order to encourage this prospecting, rewards are provided for in each act, to be given permittees who make discoveries of valuable deposits of the minerals named in their permits. The acts differ with respect to these rewards.

The act of October 2, 1917, *supra*, provides that a permittee who discovers a valuable deposit of potassium within the area covered by his permit shall be entitled to a patent for one-fourth that area, to be selected by him in a compact form. His interest in the general area ceases there, and the Secretary is authorized to lease the remaining land on such conditions as he may prescribe. In the case of a permittee under the act of February 25, 1920, *supra*, a discovery of sodium entitles him to a lease of one-half the area covered by his permit, at a minimum royalty of one-eighth the value of the total production from the area leased, and he has, in addition, a preference right to lease the remainder at not less than the royalty stated above.

The applicability of each act to lands theretofore disposed of under laws reserving to the United States the deposits named in said acts, together with the right to prospect for, mine, and remove them, is stated in almost identical terms.

Section 9 of the act of October 2, 1917, is as follows:

That the provisions of this Act shall also apply to all deposits of potassium salts in the lands of the United States which may have been or may be disposed of under laws reserving to the United States the potassium deposits with the right to prospect for, drill, mine, and remove the same, subject to such conditions as to the use and occupancy of the surface as are or may hereafter be provided by law.

Section 34 of the act of February 25, 1920, is the same as section 9 of the act of October 2, 1917, *supra*, except that the clause therein, "subject to such conditions as to the use and occupancy of the surface as are or may hereafter be provided by law" has been superseded by a clause which reads, "subject to such conditions as are or may hereafter be provided by such laws reserving such deposits." This distinction is considered immaterial.

As to the act of February 25, 1920, no provision is made in any case for any disposal save of the sodium deposits and other deposits named therein, and a right to use so much of the surface of lands containing said deposits as is necessary in the prospecting for, mining, and removing of said minerals. This would leave in the United States title to potassium deposits, not as a reservation but because the leasing act did not provide for the disposal of such deposits. There must be found, however, a reservation in said act of a right in a claimant under the act of October 2, 1917, to prospect for, mine, and remove potassium deposits from lands under permit or lease pursuant to the act of February 25, 1920, as the latter act gives to permittees and lessees thereunder exclusive rights to possession except where there has been a prior disposal, as contemplated by section 34 of said act, or where the right to make such disposal under other laws is expressly reserved. Section 29 of the leasing act provides, on this point, as follows:

*Provided*, That said Secretary, in his discretion, in making any lease under this Act, may reserve to the United States the right to lease, sell, or otherwise dispose of the surface of the lands embraced within such lease under existing law or laws hereafter enacted, in so far as said surface is not necessary for use of the lessee in extracting and removing the deposits therein: *Provided further*, That if such reservation is made it shall be so determined before the offering of such lease: \* \* \*

As this section limits the rights to be reserved to disposals of the surface of lands under permit or lease, it seems clear that only entries under such nonmineral laws as the act of July 17, 1914 {38

Stat., 509), and the act of December 29, 1916 (39 Stat., 862), were contemplated. Both these acts contain the expressed reservations described in sections 29 and 34 of the leasing act, while the act of October 2, 1917, *supra*, not only does not contain such reservations but is not an act authorizing the disposal of the surface of lands but a disposal of mineral deposits which may or may not occur on the surface of such land, and which may occur in lands which also contain deposits of sodium.

The reasons stated with respect to lands under permits or leases issued pursuant to the act of February 25, 1920, must also be applied to the question whether lands under a potassium permit or lease may be included in a permit to prospect for, or a lease of, sodium deposits, for the act of October 2, 1917, contains, in section 2, a provision for dispositions under other laws identical with that quoted above from section 29 of the act of February 25, 1920.

It may be further observed that such subsequent disposals as are authorized in section 2 of the act of October 2, 1917, *supra*, are restricted to *leases*. This clearly indicates that the Congress intended that the right of a permittee to an unlimited patent for one-fourth of the entire area under permit should only be restricted by *prior* disposals under acts which authorize the issuance of such patents. In the recent case of Joseph E. McClory (50 L. D., 623), the Department found that the leasing act of February 25, 1920, *supra*, did not authorize the issuance of a limited patent, or a patent for a specific mineral only, to a claimant seeking to make a placer mining location of land under permit, due to a discovery of gold in the shaft of a well drilled by the permittee for oil; and no authority is found in said act for the issuance of limited patents to permittees under the act of October 2, 1917, *supra*. As the permittee is entitled to select the area to be patented in a compact form from the general area covered by the permit, all the lands in said permit are potentially subject to patent, until a selection is made. Thereafter, leases only may be issued.

The granting of a potassium permit for lands already disposed of under the leasing act of February 25, 1920, must be denied for the reasons hereinbefore stated.

The Department is convinced that, while joint operation of lands for the development of potassium and sodium might be feasible and perhaps economically desirable, it is without authority of law to permit joint development under the act of October 2, 1917, and the act of February 25, 1920, *supra*. A disposal under one act precludes a disposal under the other, but it is observed that a sodium permittee must show, in addition to a valuable deposit of sodium, that

the land is *chiefly* valuable for that mineral. This would seem to prevent the undue segregation by a sodium permittee of lands chiefly valuable for potassium from development therefor.

**POTASH REGULATIONS, ACT OF OCTOBER 2, 1917—SURVEY OF  
UNSURVEYED LANDS—CIRCULAR NO. 594, AMENDED.**

**INSTRUCTIONS.**

[Circular No. 961.]

DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE,  
Washington, D. C., September 24, 1924.

REGISTERS AND RECEIVERS,  
SUPERVISOR OF SURVEYS,

UNITED STATES SURVEYORS GENERAL:

In order to establish a uniform procedure for the survey of unsurveyed lands to be included in any potash patent under authority of the act of October 2, 1917 (40 Stat., 297), the following regulations will be observed and all existing regulations in conflict therewith are hereby rescinded and rendered of no effect to the extent to which they conflict:

(1) When application for patent is approved, involving unsurveyed public lands, the United States surveyor general of the State or district in which the lands are situated will be requested to prepare an estimate of the cost of surveying the sections in which the claim will probably be situated, notify the General Land Office and the applicant thereof, and instruct the latter to make a deposit, conformable to the estimate, with the surveyor general.

(2) The surveyor general will receive and receipt for the deposit when made and hold the money as a trust fund. He will thereupon prepare and submit to the General Land Office for approval special instructions providing for the subdivision of the township in its entirety in which the claim is situated, the expense of the field work to be paid from the regular appropriation for surveying the public lands.

(3) When the survey is accepted and the plat filed in the local land office, the claim will be adjusted to the resulting subdivisions as shown upon said plat. The cost of surveying the particular lands included within the claim thus adjusted will be ascertained by prorating the total cost of surveying the township to the area thereof. The amount thus ascertained will be deducted from the claimant's deposit and credited to the appropriation for surveying the

See 51 Lm 180

public lands and the balance of the deposit, if any, returned to the depositor, his assign, or legal representative. An additional deposit will be required when necessary.

Thus each claimant will be required to pay for surveying only the lands to be included in his patent and at the same time the survey of the public lands will be carried forward under the rectangular system, township by township, as contemplated by law.

WILLIAM SPRY,  
*Commissioner.*

Approved:

E. C. FINNEY,  
*First Assistant Secretary.*

*See Page 613*

**HAZEL MEEKER JACKSON, JOHN D. LeBAR, MORTGAGEE.**

*Decided October 4, 1924.*

**STOCK-RAISING HOMESTEAD—IMPROVEMENTS—MORTGAGE—MORTGAGEE—EVIDENCE.**

While an agent, transferee, or incumbrancer is not permitted to perform any provision of the homestead law which is required to be the personal act of the entryman himself, yet a transferee or incumbrancer may, in the event that the debtor defaults, submit evidence probative of the fact that the entryman had personally fulfilled the requirements of the statute.

**STOCK-RAISING HOMESTEAD—IMPROVEMENTS—MORTGAGE—MORTGAGEE—FINAL PROOF—FRAUD.**

Where a stock-raising homestead entryman, after mortgaging the entry, defaults without submitting final proof, although requested to do so, and the proof offered by the mortgagee is found to be unsatisfactory because of insufficiency of improvements, the latter may, upon a satisfactory showing that the former had met the legal requirements of the statute with respect to improvements, but had stripped the land with the apparent intention of defeating the just claims of the mortgagee, be permitted to restore in value the improvements thus removed and to submit new proof.

**FINNEY, *First Assistant Secretary:***

John D. LeBar, mortgagee of the additional stock-raising homestead entry of Hazel Meeker Jackson, has appealed from the decision of the General Land Office, rendered July 30, 1924, holding for cancellation said entry upon the ground of insufficient improvement to meet the requirements of the statute, it appearing from the record in the case that there is a deficiency amounting to \$255 in the value of the improvements required. The proof made on the original entry has been found sufficient.

The land embraced within the said additional homestead entry here involved is the NE.  $\frac{1}{4}$ , Sec. 7, and W.  $\frac{1}{2}$  E.  $\frac{1}{4}$ , Sec. 18, T. 37 N., R. 71 W., 6th P. M., Douglas, Wyoming, land district. The

entrywoman, after mortgaging this and her original entry, left for parts unknown without offering final proof, although requested to do so, and the mortgagee here submitted proof. It was found acceptable as to the original entry, which was made under the enlarged homestead act, but unacceptable as to the additional entry, made under the stock-raising homestead act, the improvements being appraised at \$145, leaving a deficiency of \$255 in the required amount, based upon a minimum of \$1.25 for each acre entered.

The Commissioner held, in the decision appealed from, that LeBar, the mortgagee, although he stands ready to make up the deficiency in the showing of improvements and then submit supplemental proof, is not qualified to do so; none but the entrywoman or one deriving title through her being so qualified.

In his appeal to the Department, LeBar alleges that improvements of the value of at least \$1.25 per acre had been placed by the entrywoman on the land prior to the time proof on the entries was submitted, but that before leaving the vicinity (which was prior to the time the mortgagee offered proof) the entrywoman stripped the land of improvements of a value which would bring up the aggregate to as much as \$400, or \$1.25 an acre.

By decision rendered March 11, 1922 (48 L. D., 582), the Department held, quoting Alpheus R. Barringer (12 L. D., 623), that—

On requirement of new final proof a mortgagee may be permitted to show due compliance with law on the part of the entryman, prior to the submission of the original proof, where such entryman fails or refuses to comply with said requirement.

It was then further held:

It would be, of course, violative of the plain provisions of the law and contrary to its whole purpose and policy to permit an agent, transferee, or incumbrancer to perform any provision of the homestead law which is required to be the personal act of the entryman himself. The incumbrancer or transferee, in the case of a defaulting debtor, may, however, submit evidence probative of the fact that the entryman has personally met such requirement of the statute.

The governing rule and the principles underlying it are well stated in the above quotations. The instant case, however, stands upon a somewhat different footing. It appears from the record that sufficient improvements had been placed upon the land by the entrywoman to meet the legal requirements, but enough were subsequently stripped therefrom by her, apparently with intention to defeat the just claims of the mortgagee, to reduce the aggregate value to about \$145. The request of the mortgagee is merely that he be permitted to *restore* what has been removed, in value if not in kind, so that the final proof may be rendered acceptable. Such action would not be usurping or assuming the duty laid upon the entry-

woman of improving the land, as would be the case had she agreed with or looked to the mortgagee, as such, to supply the improvements.

The mortgaging of entries is resorted to very generally by entrymen to tide over periods during which the land entered does not afford a living. It is a right or privilege of great value, and therefore to be carefully safeguarded. Were mortgagees left in peril of mortgagors removing improvements from stock-raising homesteads, thus preventing the making of acceptable final proof, the risk run would in all probability be reflected in the amount of the loan obtainable or the interest charged, both of which are important considerations to the homesteader. Furthermore, in the administration of the public-land laws, it goes without saying that a course should be avoided which has a tendency to encourage deception and defeat the honest claims of creditors. The Department is convinced that the reasonable requirement, in the stock-raising homestead law, that a showing, upon submission of proof, that the entryman has made permanent improvements upon the land entered tending to increase its value for stock-raising purposes, of the value of not less than \$1.25 per acre, was not intended and should not be allowed to supply a cover for the perpetration of fraud and the defeat or evasion of just obligations.

The decision appealed from is accordingly reversed, and the mortgagee will be permitted, in the absence of other objection not here appearing, to restore the improvements taken from the land, or place thereon improvements equivalent in value, and then submit final proof.

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### LEONA JUNG.

*Decided October 4, 1924.*

#### CAREY ACT—ENLARGED HOMESTEAD—PREFERENCE RIGHT—SETTLEMENT—WIDOW.

The preference right accorded to an entryman under State Carey Act laws by the act of February 14, 1920, to make an entry under applicable public land laws, descends to the widow of one who, having died prior to the exercise of the right, had in his lifetime been declared by the Land Department to be entitled thereto by reason of his settlement upon and occupancy of the land.

#### DEPARTMENTAL DECISION DISTINGUISHED.

Case of Guardian of Juanita Elsenpeter (46 L. D., 110), cited and distinguished.

*First Assistant Secretary Finney to the Register of the United States Land Office, Great Falls, Montana:*

The Commissioner of the General Land Office has submitted to the Department the question whether Mrs. Leona Jung, widow of

Theodore Jung, could be allowed to make entry for lot 1, Sec. 2, T. 30 N., R. 5 W., M. M., Montana.

The tract described was formerly embraced in a Carey Act segregation, but was released from the withdrawal and restored to entry. The lot has been designated under the enlarged homestead act, as has the land embraced in Mr. Jung's patented homestead entry for 160.42 acres of adjoining land—lots 3 and 4 and S.  $\frac{1}{2}$  NW.  $\frac{1}{4}$ , Sec. 2, said township.

By decision dated May 31, 1924, the Commissioner of the General Land Office held that Mr. Jung was entitled to a preference right to make entry for said lot under the provisions of the act of February 14, 1920 (41 Stat., 407), it having been shown that he was a *bona fide* entryman of the lot under the State Carey Act laws. Jung complied with the regulations of the State land board, and certificate issued May 19, 1913. Shortly after the date of the Commissioner's decision of May 31, 1924, Jung died, leaving a widow and four minor children. The widow requested you to forward to her, at Rollingstone, Minnesota, the proper blank form for use by her in making entry. On August 23, 1924, Mrs. Jung filed in your office an informal application to make entry for the lot under section 3 of the enlarged homestead act, executed before a notary public in Winona County, Minnesota.

The Department has held in the case of Timothy Sullivan, guardian of Juanita Elsenpeter (46 L. D., 110), that a widow of a homestead entryman could not make an additional homestead entry based on her husband's original entry. But the rule there announced is not applicable to the case of Mrs. Jung. Her husband had settled upon and occupied the land for many years, and had purchased the tract from the State land board at a time when it was expected that it would be patented to the State under the Carey Act. Congress, by the act of February 14, 1920, *supra*, recognized such claims as allowable, and the Commissioner of the General Land Office, in the lifetime of Jung, had determined that he had a preference right to make entry for the lot. Being a settlement claim under the homestead law, the right descended to the widow of the claimant, and she should be allowed to make the entry applied for.

The application filed by Mrs. Jung on August 23, 1924, was not executed on the prescribed form, nor before a qualified officer in your district; but the facts are a matter of record, and, considering the circumstances, the Department is of opinion that the defects in the application may be waived, subject to confirmation by the

Board of Equitable Adjudication if acceptable final proof is later submitted.

You will, therefore, assign to Mrs. Jung's application (herewith returned) a current serial number, and allow her thirty days within which to pay the required fee and commissions. Upon such payment being made, you will, in the absence of objection not now appearing, attach your certificate of allowance and a copy hereof, and forward the same with your regular returns, after notifying Mrs. Jung of your action.

### **AUTHORITY OF A SINGLE WOMAN APPOINTED UNITED STATES COMMISSIONER TO ACT IN MAIDEN NAME AFTER MARRIAGE.**

*Decided October 6, 1924.*

**OFFICERS—UNITED STATES COMMISSIONER—RECORDS—PRACTICE—MARRIAGE.**

Official papers in land matters executed before a United States Commissioner in her maiden name and under which she was commissioned should be accepted, in the absence of other objection, notwithstanding her marriage while holding such appointment.

*First Assistant Secretary Finney to the Commissioner of the General Land Office:*

Reference is made to the question raised by the register of the local land office at Lewiston, Montana, in his letter of September 17, 1924, in respect to the propriety of recognizing official papers in land matters executed before Alice M. Allen, United States Commissioner, in her maiden name, it being shown that she is now married to Carl Whittier.

It appears that notices of intention to make final proof before Alice M. Allen are being held by the local land office, awaiting instructions as to whether it will be necessary for her to furnish a new seal in the name of Whittier and have proofs set before her in that name.

The Department is of opinion that the office held by Miss Allen was not vacated or forfeited by her marriage, and that papers executed before her in the name under which she was commissioned should be accepted in the absence of other objections.

The matter of amendment or substitution of the commission and seal to conform to the married name is not within the jurisdiction of this Department.

You will therefore advise the local officers to set the proofs for hearing in accordance with the notices if otherwise proper.

**APPLICABILITY OF THE MINING LAWS TO LANDS KNOWN TO  
CONTAIN ANY OF THE MINERALS NAMED IN THE LEASING  
ACTS OF OCTOBER 2, 1917, AND FEBRUARY 25, 1920.**

*Decided October 9, 1924.*

**PHOSPHATE LANDS—SALINE LAND—OIL AND GAS LANDS—COAL LANDS—MINERAL  
LANDS—MINING CLAIM.**

On and after the passage of the leasing acts of October 2, 1917, and February 25, 1920, lands which at the time of an attempted location on account of metalliferous deposits are known to be valuable for any of the minerals named in those acts are not subject to appropriation under the preexisting mining laws.

**DEPARTMENTAL DECISION CITED AND APPLIED.**

Case of Joseph E. McClory (50 L. D., 623), cited and applied.

*Secretary Work to Hon. Charles L. Richards, House of Representatives:*

Acknowledgment is made of the receipt of your letter of August 25, 1924, relative to the manner of disposition of lands "valuable for saline salts, borax, potash, etc., which also contain gold values," inquiry being specifically made as to whether mineral rights would prevail under placer location for such lands.

By section 12 of the act of October 2, 1917 (40 Stat., 297), deposits of chlorides, sulphates, carbonates, borates, silicates, and nitrates of potassium, in lands valuable for such deposits, and by section 37 of the act of February 25, 1920 (41 Stat., 437), deposits of coal, phosphates, sodium (including chlorides, sulphates, carbonates, borates, silicates, and nitrates of sodium), oil, oil shale, and gas, in lands valuable for such minerals, are made subject to disposition only in the form and manner provided in such acts, except as to valid claims existent at the dates of the passage of the acts, and thereafter maintained in compliance with the laws under which initiated. Prior to these acts the deposits named therein, except coal, were subject to appropriation only under the provisions of the mineral laws, such laws having been extended to the public lands of the United States containing salt springs and deposits of salt in any form and chiefly valuable therefor by the act of January 31, 1901 (31 Stat., 745).

While the Department has not heretofore had occasion to pass upon the question as to whether lands valuable for the potassium deposits named in the act of October 2, 1917, or for sodium salts, including borates of sodium (or borax) or any of the other minerals named in the act of February 25, 1920, were respectively, after the date of said act subject to the initiation of locations thereon under the general provisions of the mining laws, on account of gold or

other metalliferous mineral deposits, it has recently had before it, in the case of Joseph E. McClory *et al.* (50 L. D., 623), the question as to whether land embraced in a permit issued under section 13 of the said act of 1920, for the prospecting of oil and gas, was subject to mineral patent on the basis of an asserted placer mining location sought to be initiated after the date of the permit, on account of a deposit of gold. It was there held, under the authority of cited decisions of the Supreme Court of the United States that there is no warrant for the issuance to a placer mining claimant of a patent with a reservation to the United States of oil and gas deposits contained in land so sought to be located; that a mineral patent, if issued for the land, would carry title to the surface of, and everything contained within, the land; and that an unrestricted patent could not issue to the mineral claimant for the reason that it would defeat the exclusive right of the permittee, during the period covered by the permit, to prospect for oil and gas on the land, and whatever inchoate rights he might otherwise have to the land by virtue of his permit.

Although the decision in the McClory case went only to the question of patentability of the asserted location there involved, the principles upon which that decision is based would apply with equal force to the question as to the locatability under the mining laws, on account of a metalliferous mineral deposit, after the passage of the act of 1917, of lands known to be valuable for deposits of potassium, and after the passage of the act of 1920, of lands known to be valuable for deposits of coal, phosphates, sodium, oil, oil shale, or gas. The said acts, which are known as the leasing acts, expressly prohibit the disposition of any of the minerals named therein save in the form and manner prescribed by the acts, and make no provision for the location or patenting under the mining laws of lands containing them, with a reservation of such minerals to the United States. On the other hand, it is in substance provided in sections 2322 and 2325 of the Revised Statutes, comprised in the mining laws, that the locators of mining locations, their heirs, and assigns, on lands subject to such location, and with respect to which locations the requirements of the mining laws have been complied with, shall, all else being regular, be entitled to the exclusive right of possession of, and an unrestricted patent to, the land so located. Clearly, therefore, there can be no room for the contemporaneous operation of both the mining laws and one or the other of the leasing acts with respect to the same lands, if known at the time a mining location is sought to be made thereof after the passage of the applicable leasing act, to be valuable on account of any of the minerals named in the acts, and the Department would be constrained to hold that as to

such lands, even if containing metalliferous mineral deposits, the mining laws have been repealed by the later leasing acts. So construing the law the Department would be unable to recognize as of any validity a mining location sought to be made, since the dates of the leasing acts, on account of a metalliferous deposit, of land known at the time of such attempted location to be valuable for any of the minerals named in the acts.

While the effect of this conclusion would be to bar the patenting of lands such as those here under discussion, under the mining laws, the situation is one that in the opinion of the Department can be remedied only through legislation by Congress.

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**DENVER EXPLORATION AND DEVELOPMENT COMPANY, ASSIGNEE  
OF ROY F. SMITH ET AL.**

*Decided October 9, 1924.*

**OIL AND GAS LANDS—PROSPECTING PERMIT—CONTRIBUTION—DILIGENCE—EXTENSION OF TIME.**

A contribution to the cost of a test well on lands covered by a prospecting permit held by another does not excuse a permittee from ultimately drilling the area covered by his permit, but merely constitutes, in proper cases, diligence sufficient to warrant an extension of time within which to begin drilling as authorized by the act of January 11, 1922.

**OIL AND GAS LANDS—PROSPECTING PERMIT—ASSIGNMENT—CONTRIBUTION—DILIGENCE—EXTENSION OF TIME.**

An assignment with departmental approval of substantial interests in several oil and gas prospecting permits to a driller as consideration for drilling a test well made in conjunction with a contract for the immediate development of lands covered by one of the permits, constitutes an actual contribution to the cost of the test and entitles the permittees to extensions of time to begin drilling upon the lands covered by the other permits; but the duty devolves upon the permittees to enforce fulfillment of the contract and lack of diligence in that respect will be a bar to further extension.

**OIL AND GAS LANDS—LEASE—ASSIGNMENT.**

Section 27 of the act of February 25, 1920, does not contain any express limitation preventing a corporation, if authorized by its charter, from becoming interested, as a member of an association, in more than one lease on a geologic structure or more than three leases in a State, provided that the interests, both direct and indirect, do not exceed 2,560 and 7,680 acres, respectively.

**OIL AND GAS LANDS—PROSPECTING PERMIT—LEASE—ASSIGNMENT.**

The assignee of a lease, in whole or in part, and the assignee of a prospecting permit in its entirety assume obligations to the United States to the same extent as though the lease or permit had issued to the assignee in the first instance.

## OIL AND GAS LANDS—PROSPECTING PERMIT—LEASE—ASSIGNMENT.

Where a prospecting permit is only partially assigned, the permit will still be regarded as a unit and the permittee and assignee as associates with indirect interests, and as such entitled to interests in more than one permit upon the geologic structure, provided that the limitation as to acreage contained in section 27 of the leasing act is not exceeded; upon discovery both will be entitled to leases for their proportionate parts of the entire area, and at a royalty of five per cent upon an area equal to one-fourth of the area described in the permit as issued.

## OIL AND GAS LANDS—PROSPECTING PERMIT—LEASE—ASSIGNMENT.

Where undivided interests in a prospecting permit or lease are assigned, the permit or lease remains a unit after assignment, and the permittee or lessee and the assignee become associates, and as such may be interested in more than one permit or lease upon a geologic structure, provided that the limitation as to acreage is not exceeded.

## DEPARTMENTAL DECISION DISTINGUISHED.

Case of *Armstrong v. McKanna* (50 L. D., 610), distinguished.

FINNEY, *First Assistant Secretary*:

I have before me your [Commissioner of the General Land Office] proposed letter to the registers and receivers of the Montrose and Durango land offices, in the matter of the development of the lands covered by seven permits, held under section 13 of the leasing act of February 25, 1920 (41 Stat., 437), by Roy F. Smith, Finlay L. MacFarland, James C. Sweeney and John N. Stoddard, William I. Overstreet, Frederick J. Chamberlain, William O. Evans, and Perl B. Gates.

It appears that these permittees were granted permits, in 1921 and 1922 for 2,560 acres of unsurveyed land in each case except that of P. B. Gates, whose permit covers 1,320 acres, and were granted extensions of time within which to commence drilling until July 31, 1924. They now propose to secure the drilling of a test well on the land covered by one of the permits by the Denver Exploration and Development Company, a corporation claimed to have been organized by the permittees and others. It is proposed to assign to this company, as consideration for this drilling, one-sixth interests in six of the permits. This arrangement is offered by the permittees as compliance with the terms of their permits.

I concur in the holding in your proposed letter that a contribution to the cost of a test well does not excuse a permittee from ultimately drilling the area covered by his permit, but merely constitutes, in proper cases, diligence sufficient to warrant an extension of time within which to begin such drilling, as provided in the act of January 11, 1922 (42 Stat., 356).

The case presents, however, the question whether an agreement to assign certain acreage to the company about to drill is a contribu-

tion to the cost of such well which will warrant an extension of time. In the recent case of *Armstrong v. McKanna* (50 L. D., 610), the Department held that an agreement to drill a well upon permitted lands which made such drilling contingent upon the success of a test well near by was a mere paper transaction which did not advance the development of the land under permit nor constitute diligence on the part of the permittee which would warrant an extension of time under the act of January 11, 1922, *supra*.

I am of the opinion, however, that permittees who contract for the immediate development of the lands covered by one of their permits, as a test, and assign substantial interests in their permits to the driller as consideration therefor, are making an actual contribution to the cost of a test well which will entitle them to extensions of time for reasonable periods within which they may begin drilling upon the lands covered by their permits. The assignments must be approved by the Department before such extensions are granted, and the duty will be upon the permittees to compel the assignee to drill as agreed, and lack of diligence in that respect will bar them from further extensions of time.

This brings us to that portion of your proposed letter which states that the developing company can not acquire, by assignment, interests *directly* or *indirectly* in more than one prospecting permit upon a geologic structure, and, consequently, that this plan of development is not feasible.

The limitations of section 27 of the leasing act, while referring specifically to leases, have been construed to extend to permits, for the reason that such permits, upon a discovery of oil or gas, give the permittee a *right* to a lease. The limitations of that section are as to direct and indirect holdings. The limitation as to *direct* holdings is on the number of leases (or permits) which may be held, and restricts persons, associations, and corporations, equally, to one lease (or permit) upon a geologic structure, and to not more than three such leases (or permits) in a State. As to *indirect* interests, however, there is a general limitation upon persons, associations, and corporations, in terms of acres, which limits them to aggregate interests, direct and indirect, in 2,560 acres on a geologic structure, and to 7,680 acres in a State.

While the term "indirect interests" is not used in section 27 of the act, the term "direct interest" is used to distinguish leases held directly by a person, or corporation, from interests in leases acquired through ownership of stock in corporations and through membership in associations. There is a specially expressed restriction on corporations, which denies them the right accorded an

individual to acquire interests in more than one permit or lease through the ownership of stock in other corporations. Regulations of March 11, 1920 (47 L. D., 437, 473). There is no such expressed limitation preventing a corporation, if authorized by its charter, from becoming interested, as a member of an association, in more than one lease (or permit) on a geologic structure and in more than three such leases (or permits) in a State, provided its interests, both direct and indirect, do not exceed in the aggregate 2,560 acres on a geologic structure, or 7,680 acres in a State.

The question remaining is whether one who acquires an oil lease or a prospecting permit by assignment acquires a direct or indirect interest, within the meaning of section 27 of the leasing act.

In the case of a lease, the assignee, whether acquiring a portion of the area leased or all of it, acquires an obligation to the United States with respect thereto of the same character as though a lease had issued to him in the first instance. The same is true where there is an assignment of a prospecting permit in its entirety.

The assignment of permits has been permitted by the Department in the exercise of the discretion vested in the Secretary of the Interior in section 32 of the act, and, where a permittee assigns his rights as to only part of the land covered thereby, the assignee does not acquire a separate and distinct obligation. While he is required to furnish a bond as security for damages resulting to the oil strata from improper methods of operation, drilling to a discovery by either permittee or assignee will entitle both to apply for leases, and the one-fourth area to be claimed at 5 per cent as a reward for discovery is computed upon the entire acreage covered by the permit and must conform to an election made before the assignment was approved. Thus it will be seen that, as to partial assignments of permits, the permit still exists as a unit after assignment; and the permittee and assignee are, in fact, associates, and as such may be interested in more than one permit upon a geologic structure, provided they do not exceed the acreage limitation of 2,560 acres. In cases where undivided interests in either permits or leases are assigned, the same result would obtain and the same limitation would apply. In this case it is not clear whether the interests to be assigned will be as to specific acreage or undivided interests.

The recognition of an assignee of a portion of the area in a permit as having an indirect interest, with a resulting acquisition of interests up to 2,560 acres in more than one permit upon a geologic structure, will not vest a monopolistic control in any person or corporation, nor permit an interest which could not be otherwise acquired, as the Department has, in proper cases, allowed permittees to associate themselves together and, upon their request, has

canceled from their permits areas desired to be held by the association, and issued consolidated permits therefor. Such consolidated permits have been thereafter assigned to developing corporations.

The proposed letter to the local officers in this case should be amended to conform to the views herein expressed.

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## RULE 61 OF PRACTICE, ABROGATED.

### INSTRUCTIONS.

[Circular No. 962.]

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., October 10, 1924.

REGISTERS AND RECEIVERS,

UNITED STATES LAND OFFICES:

Rule 61 of the Rules of Practice, requiring a statement of costs to accompany the contest record as transmitted to the General Land Office, no longer serving the purpose for which it was originally adopted, is hereby abolished.

GEO. R. WICKHAM,  
*Acting Commissioner.*

Approved:

E. C. FINNEY,  
*First Assistant Secretary.*

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## WALTER W. HALL ET AL.

*Decided October 11, 1924.*

OREGON AND CALIFORNIA RAILROAD LANDS—MINERAL LANDS—MINING CLAIM—  
POWER SITES—FEDERAL WATER POWER ACT.

The proviso to section 24 of the Federal Water Power Act, considered in the light of the provisions of section 2 of the act of June 9, 1916, operates retroactively to validate mining claims, otherwise regular, located upon lands within the forfeited grant to the Oregon and California Railroad Company, after their Executive withdrawal as "power site lands," but prior to their classification as such, the claims, however, being subject to the conditions and limitations of said section 24.

DEPARTMENTAL DECISION OVERRULED.

Case of Dailey Clay Products Company (48 L. D., 429, 431), overruled so far as in conflict.

FINNEY, *First Assistant Secretary*:

The Commissioner of the General Land Office has submitted to the Department for its approval proposed instructions by him to

the local officers in the matter of the application 07534 of Walter W. and Samuel J. Hall for mineral patent to what is denominated the Pottery or Fire Clay Nos. 1 and 2 placer mining claims (comprised apparently of one location), embracing the NE.  $\frac{1}{4}$  NE.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , NW.  $\frac{1}{4}$  NE.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , SE.  $\frac{1}{4}$  SE.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ , and SW.  $\frac{1}{4}$  SE.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ , Sec. 1, T. 6 S., R. 2 E., W. M., Portland land district, Oregon.

The area in question is part of an odd-numbered section within the limits of the Oregon and California Railroad land grant, the title to which was revested in the United States by the act of June 9, 1916 (39 Stat., 218). Section 2 of said act authorized and directed the Secretary of the Interior, after due examination, to classify said revested lands into three classes as follows:

That the Secretary of the Interior, in cooperation with the Secretary of Agriculture, or otherwise, is hereby authorized and directed, after due examination in the field, to classify said lands by the smallest legal subdivisions thereof into three classes, as follows:

Class one. Power-site lands, which shall include only such lands as are chiefly valuable for water-power sites, which lands shall be subject to withdrawal and such use and disposition as has been or may be provided by law for other public lands of like character.

Class two. Timberlands, which shall include lands bearing a growth of timber not less than three hundred thousand feet board measure on each forty-acre subdivision.

Class three. Agricultural lands, which shall include all lands not falling within either of the two other classes.

By section 3 of said act, it is provided:

That the classification provided for by the preceding section shall not operate to exclude from exploration, entry, and disposition, under the mineral-land laws of the United States, any of said lands, except power sites, which are chiefly valuable for the mineral deposits contained therein, and the general mineral laws are hereby extended to all of said lands, except power sites.

By section 11 of the act the Secretary was authorized to perform any and all acts and to make such rules and regulations as might be necessary and proper for the purpose of carrying the provisions of the act into full force and effect.

For the declared purpose of facilitating the carrying out of the provisions of the above-mentioned act, and to protect the interests of the Government, the public, and the railroad company, all of the odd-numbered sections within the primary and indemnity limits of the former grant, and not excepted by the terms of the act, were by Executive order of July 31, 1916, and under the authority of said section 11 of the act and of the act of June 25, 1910 (36 Stat., 847), as amended by the act of August 24, 1912 (37 Stat., 497), withdrawn from settlement, entry, or other disposition until otherwise directed,

excepting, however, from the force and effect of the withdrawal any land embraced in any prior claim existing at the date of the order, so long as such claim should be maintained in accordance with the law and regulations whereunder it was asserted.

By departmental order of December 12, 1917, the area particularly above described, together with other lands within the limits of said former grant was classified as "power-site lands," and by Executive order of the same date, the lands so classified were, under and pursuant to the provisions of the act of June 25, 1910, *supra*, as amended by the act of August 24, 1912, *supra*, and of the said act of 1916, "withdrawn from settlement, location, sale, or entry, and reserved for water-power sites," and placed in Power-Site Reserve No. 661, the withdrawals and classifications still remaining of record so far as the area here in question is concerned.

The claim upon which the application of the Halls is based purports to have been located January 12, 1917, while the land was covered by the first Executive withdrawal, but prior to its classification as power-site land and its inclusion in Power-Site Reserve No. 661. In the patent application the land is alleged to have been located on account of a deposit of what is termed by the applicants pottery clay, fire clay, or china clay, a nonmetalliferous mineral. The application was rejected by the local officers for the reason that the area in question has been classified as power-site land under the act of 1916 and was for that reason not subject to disposition under the mining laws.

The paper under consideration, without discussing the above-quoted provisions of section 3 of the act of 1916, refers to those of section 2 thereof and declares that since they provide that power-site lands shall be subject to withdrawal and such use and disposition as has been or may be provided by law for other public lands of like character, there seems to be no reason why such lands could not be disposed of under the mineral land laws, provided those laws are applicable to other lands of like character. The paper then quotes the provisions of section 24 of the Federal Water Power Act of June 10, 1920 (41 Stat., 1063), and, notwithstanding the fact that the area involved has been at all times since July 31, 1916, included in Executive withdrawals from location and entry under the mining laws on account of deposits of nonmetalliferous minerals, proposes that the applicants be notified that they will be allowed thirty days within which to complete their proofs and make payment for the land, and consent to take a patent therefor, subject to the provisions of said section 24, and that upon compliance with such requirements, final certificate be issued upon the application, it being stated that through informal inquiry of the Federal Power Commission it had

been learned that the said area might be conditionally restored upon application therefor.

In the proviso to section 24 of the Federal Water Power Act it is declared—

That locations, entries, selections, or filings heretofore made for lands reserved as water-power sites or in connection with water-power development or electrical transmission may proceed to approval or patent under and subject to the limitations and conditions in this section contained.

Under the terms of the said proviso lands outside the limits of the former Oregon and California Railroad grant, reserved as water-power sites and located on account of nonmetalliferous mineral deposits prior to the approval of the Federal Water Power Act and after the withdrawal of the lands, would be patentable under the mining laws, subject to the limitations and conditions prescribed by the section. That view is in harmony with the unreported departmental decision of July 9, 1920, in the case of Henry Bolthoff, which involved land located as a mill site prior to the date of said act but after its reservation as a power site. The Department there held that the area involved was not subject to entry as a mill site at the date of its location, but that under the terms of the proviso to said section 24 it was nevertheless patentable, subject to the limitations and conditions contained in the section. While by the provisions of section 3 of the act of 1916, the revested Oregon and California lands classified as power sites were expressly excluded from the operation of the mining laws, it was nevertheless provided by section 2 of that act that such of said lands as should be chiefly valuable for water-power sites, shall be subject to withdrawal and "such use and disposition as has been or *may be* provided by law for other public lands of like character." [Italics supplied.]

Considered in the light of this provision the proviso to section 24 of the Federal Water Power Act may be held to have operated retroactively to extend the provisions of the mining laws to such of said lands as had been located after withdrawal thereof for water-power sites and prior to the act of 1920, as of the dates of their location, but subject to the conditions and limitations contained in the section, and to that extent to validate locations so made if the provisions of the mining laws were otherwise complied with, thus rendering them patentable, all else being regular, after the date of the act.

The foregoing is out of accord with the decisions of the Department in the Dailey Clay Products Company (48 L. D., 429), and the same case, on rehearing (id., 431), involving an area immediately adjoining that here in question and occupying precisely the same status; located December 14, 1916, on account of a deposit termed by the claimants fire clay or kaolin. An application for patent under the mining laws to said claim was presented November 20, 1919,

and was held for rejection by the Commissioner for the stated reason that the location was invalid because the area was included in said Power-Site Reserve No. 661, the Executive order creating which, the Commissioner declared, "expressly excepts lands so reserved from appropriation under the mining laws, unless the lands contained valuable deposits of metalliferous minerals"; and the Department affirmed that action. The decisions cited, however, did not take into account the proviso to said section 24 of the Federal Water Power Act, which the Department now regards as applicable to such lands so located. For the reasons herein stated, therefore, the said decisions, in so far as inconsistent with the views herein expressed, are overruled.

With a slight modification the said proposed instructions of the Commissioner have been approved.

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### SAN JOAQUIN LIGHT AND POWER CORPORATION.

*Decided October 31, 1924.*

#### WATER POWER PROJECT—NATIONAL FORESTS—RELINQUISHMENT—LIEU SELECTION—RECONVEYANCE.

The issuance of a license for a water power project as to a tract of land within a national forest which was relinquished to the United States as base for a lieu selection under the act of June 4, 1897, is a disposition of the land within the contemplation of section 2 of the act of September 22, 1922, and precludes the Secretary of the Interior from quitclaiming it pursuant to section 1 of the latter act.

#### *Acting Secretary Edwards to the Federal Power Commission:*

The Commissioner of the General Land Office has forwarded to the Department your letter of July 10, 1924—E, Projects, California (No. 175), San Joaquin Light and Power Corporation—with which you inclosed a communication from Mr. Murray Bourne, general counsel of the San Joaquin Light and Power Corporation, relative to the E.  $\frac{1}{2}$ , Sec. 36, T. 10 S., R. 27 E., M. D. M., California, within the limits of the Sierra National Forest.

The tract described was conveyed to the United States by C. W. Clarke, as base for selections under the act of June 4, 1897 (30 Stat., 11, 36), but the selections were rejected, for reasons not necessary to set forth here. It is now embraced in Water Power Project No. 175 of the San Joaquin Light and Power Corporation, application for which was filed February 11, 1921, pursuant to which your Commission on July 28, 1922, issued a 50-year license. You state that the tract will be covered in part by what is known as the Wishon Storage Reservoir of said project.

The Department is of opinion that the issuance of the license to the San Joaquin Light and Power Corporation constituted a disposition of the tract within the meaning of section 2 of the act of September 22, 1922 (42 Stat., 1017), and that the Secretary of the Interior is forbidden to quitclaim the tract to the party who conveyed it to the United States.

## PUBLICATION OF NOTICE UPON APPLICATION FOR MINERAL PATENT.

*Instructions, November 7, 1924.*

### NOTICE—MINING CLAIM—APPLICATION—PATENT.

A published notice that an application for a mineral patent "is about to be filed" does not meet the requirement of section 2325, Revised Statutes, that a notice that an application for such patent "has been filed" shall be published, and consequently does not afford a basis for mineral patent.

*First Assistant Secretary Finney to the Commissioner of the General Land Office:*

You have submitted for consideration the question whether a published notice of mineral application, not signed by the register of the local office, is acceptable.

The register of the Rapid City, South Dakota, land office has forwarded to your office a clipping from a paper containing two notices of application for mineral patent, both signed by the mineral applicant by his attorney in fact. The register reported that the applications for both of the properties are apparently in proper form, but the records are being held for instructions as to whether, in the absence of the signature of the register to the notices, the same can be accepted.

Each of the notices referred to states that the applicant "is about to make application to the United States for a patent," etc.

Section 2325, Revised Statutes, provides that upon the filing of an application for a mineral patent, plat, field notes, notices, and affidavits, the register of the land office shall publish a notice that such application has been made, for the period of sixty days, in a newspaper to be by him designated as published nearest to such claim, and that he shall also post such notice in his office for the same period.

The absence of the signature of the register is not the only defect in the published notices. A notice that an application for patent is about to be filed is not the equivalent of a notice that an application has been filed. An adverse claimant would be bound by the

publication and posting of a proper notice, whereas a notice that an application is about to be filed would require no action by him.

A published notice which does not comply with the plain provisions of the statute can not be made the basis for a mineral patent.

You will instruct the register to issue and post the notices required by the statute.

## EXCHANGE OF LANDS IN UTAH FOR LANDS IN UTAH NATIONAL PARK AND ZION NATIONAL PARK—ACT OF JUNE 7, 1924.

### INSTRUCTIONS.

[Circular No. 964.]

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

*Washington, D. C., November 10, 1924.*

CHIEF OF FIELD DIVISION, SALT LAKE CITY, UTAH; SUPERINTENDENT OF UTAH NATIONAL PARK AND ZION NATIONAL PARK, SPRINGDALE, UTAH; REGISTERS AND RECEIVERS, UNITED STATES LAND OFFICES, UTAH:

The act of June 7, 1924 (43 Stat., 593), entitled, "An act To establish the Utah National Park in the State of Utah," reads as follows:

That there is hereby reserved and withdrawn from settlement, occupancy, or disposal under the laws of the United States and dedicated and set apart as a public park for the benefit and enjoyment of the people, under the name of the "Utah National Park," the tract of land in the State of Utah particularly described by and included within metes and bounds, as follows, to wit:

Unsurveyed sections 31 and 32, township 36 south, range 3 west; surveyed section 36, township 36 south, range 4 west; north half, southwest quarter and west half of the southeast quarter of partially surveyed section 5; unsurveyed sections 6 and 7, west half, west half of the northeast quarter, and west half of the southwest quarter of partially surveyed section 8; partially surveyed section 17 and unsurveyed section 18, township 37 south, range 3 west; and unsurveyed sections 1, 12, and 13, township 37 south, range 4, all west of the Salt Lake meridian, in the State of Utah; *Provided*, That all the land within the exterior boundaries of the aforesaid tract shall first become the property of the United States.

Sec. 2. That the administration, protection, and promotion of said Utah National Park shall be exercised under the direction of the Secretary of the Interior by the National Park Service, subject to the provisions of the Act of August 25, 1916, entitled "An Act to establish a National Park Service, and for other purposes."

Sec. 3. That nothing herein contained shall affect any valid existing claim, location, or entry under the land laws of the United States, whether for homestead, mineral, right of way, or any other purpose whatsoever, or shall affect the rights of any such claimant, locator, or entryman to the full use and enjoyment of his land: *Provided*, That the Secretary of the Interior

is hereby authorized to exchange, in his discretion, alienated lands in this and Zion National Park for unappropriated and unreserved public lands of equal value and approximately equal area in the State of Utah outside of said parks.

*Applications.*—Applications for an exchange under the act must be filed in the local land office having jurisdiction over the land selected, the application describing the land to be conveyed as well as the land selected, according to Government subdivisions. Nothing less than a legal subdivision may be surrendered or selected. The selected land must be entirely within the State of Utah. Selections must be made by the owner of the land relinquished or in his name by a duly authorized agent or attorney in fact, and when made by an agent or attorney in fact proof of authority must be furnished. The application must be accompanied by the necessary relinquishment, abstract of title, affidavits, and fees, as set forth in Circular No. 863, dated October 28, 1922 (49 L. D., 365), entitled: "Consolidation of National Forests," and you will be governed thereby in acting on the applications, noting on your records that the selection is made under the act of June 7, 1924 (Public No. 227).

*Action by Register and Receiver.*—If a selection appears regular and in conformity with the law and these regulations the selection will be referred by the register and receiver to the chief of field division for field examination of both the selected and the base lands to determine whether or not their value is equal within the meaning of this act, with reference to their characteristics as mineral, prairie, grazing, agricultural, timber, desert land or otherwise, as the case may be, and to submit report with specific recommendation. A representative of the field division will cooperate with a representative of the superintendent of the Utah National Park and Zion National Park in the examination and valuation of the base lands within the Utah National Park and Zion National Park. Should the report of the chief of field division be adverse to the applicant opportunity will be given the party in interest to amend his application to conform with the recommendation of the field division by the register and receiver of the United States land office in which the application was filed.

*Publication of Notice.*—If the chief of field division recommends the approval of the exchange and the selection appears regular and in conformity with the law and these regulations, the register and receiver will notify the applicant and require him, within thirty days from receipt of notice, to begin publication of notice of his application in accordance with said Circular No. 863, and in due time to submit proof thereof.

*Protests.*—Protests will be disposed of as provided in said Circular No. 863.

*Action on the Application.*—Should no objections appear on your records, you will certify the condition of the record on the application and will promptly transmit the original application and accompanying papers to this office by special letter.

Upon receipt of an application in the General Land Office the same will be examined at as early a date as practicable and if found defective an opportunity will be given the parties in interest to cure the defects, if possible. If the selection appears regular and in conformity with the law and these regulations the selection, with the report, will, in the absence of objections, be transmitted to the Secretary of the Interior with appropriate recommendation.

If the Secretary decides that the application should be allowed, the applicant will be required to have his relinquishment recorded in the manner prescribed by the laws of the State of Utah and have the abstract of title extended down to and including the date the deed or relinquishment or conveyance was recorded.

If the Secretary be of the opinion that further evidence as to value and character of land involved is necessary, he may institute such inquiry as he may deem advisable.

The Secretary of the Interior may, in the exercise of his discretion, withhold his approval from any application made under the provisions of this act although the applicant may have complied with the rules and regulations herein prescribed.

S. V. PROUDFIT,

*Acting Assistant Commissioner.*

ARNO B. CAMMERER,

*Acting Director, National Park Service.*

Approved:

E. C. FINNEY,

*First Assistant Secretary.*

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WYMAN v. CLARK.

*Decided November 10, 1924.*

HOMESTEAD ENTRY—FINAL PROOF—FEES AND COMMISSIONS—PAYMENT—VESTED RIGHTS—OIL AND GAS LANDS.

The time of the submission of final proof upon a homestead entry showing full compliance with all the requirements of law, if unrefuted, and the payment of the requisite fees and commissions, marks the vesting in the entryman of equitable title to the land, regardless of any change as to its character that may thereafter be discovered before examination and approval of the proof by the General Land Office.

**HOMESTEAD ENTRY—MINERAL LANDS—OIL AND GAS LANDS—PROSPECTING PERMIT—VESTED RIGHTS—WAIVER.**

The right of an entryman under the agricultural land laws to file a waiver of mineral rights, if he desires, at any time prior to issuance of patent, and thereupon himself seek a permit or lease under the leasing act, ceases to exist when he permits another to acquire, after the vesting of equitable title in him under the entry, lawful rights that would be adversely affected.

**HOMESTEAD ENTRY—PATENT—RESERVATION—FINAL PROOF—OIL AND GAS LANDS—LEASE.**

A protest by one claiming under an oil lease executed by a homestead entryman against the entryman's consent to take a limited patent as prescribed by the act of July 17, 1914, will not lie where at the time of the submission of final proof the land was known to be prospectively valuable for petroleum deposits.

**OIL AND GAS LANDS—PROSPECTING PERMIT—CONTIGUITY.**

Noncontiguous areas of oil and gas lands, to be subject to a single permit under section 13 of the act of February 25, 1920, must be such as may be included in an area six miles square.

**DEPARTMENTAL DECISIONS CITED AND APPLIED.**

Cases of Fred Mathews (48 L. D., 259), and Helen F. Curns (50 L. D., 353), cited and applied.

*First Assistant Secretary Finney to the Commissioner of the General Land Office:*

June 14, 1924, David A. Clark filed application 025072 under section 13 of the leasing act for a permit to prospect for oil and gas upon the S.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , Sec. 20, and S.  $\frac{1}{2}$  NW.  $\frac{1}{4}$ , and N.  $\frac{1}{2}$  SW.  $\frac{1}{4}$ , Sec. 21, T. 3 N., R. 91 W., 6th P. M., Glenwood Springs land district, Colorado, asserting a preference right to such permit under section 20 of the act, by virtue of his homestead entry 022025, embracing said land. June 18, 1924, the applicant filed a supplemental or amended prospecting permit application under said section 13, covering, besides the above-described lands, the E.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , and SE.  $\frac{1}{4}$ , Sec. 31, S.  $\frac{1}{2}$ , Sec. 32, and all of Sec. 33, T. 3 N., R. 90 W.

The homestead entry of Clark was allowed February 19, 1923, without mineral reservation, on an application filed June 7, 1922, within ninety days after the filing in the local land office of a plat of survey of the township in which the entered lands are situated, the application being based upon a settlement alleged to have been initiated in 1915, during the suspension of a previous survey of the township.

Final proof was submitted on the entry May 31, 1924, but the same was suspended pending field investigation, and final certificate has not yet issued. June 16, 1924, the entryman filed in the local office his election to take a patent to the entered land, subject to the provisions, reservations, conditions and limitations of the act of

July 17, 1914 (38 Stat., 509). August 21, 1924, there was filed in the General Land Office a petition, verified by the entryman August 2, 1924, praying that the said mineral waiver filed by him be disregarded and that an unrestricted patent issue on his entry, and that the prospecting permit application previously filed by him be held in abeyance and considered only in the event that the Department should refuse to disregard the mineral waiver. Thereafter, and on September 6, 1924, there was filed in the General Land Office an instrument, subscribed and verified by Clark August 30, 1924, wherein he renewed his request that the entry be considered under the said act of 1914, and patent issue subject to the provisions, reservations, conditions and limitations thereof.

September 15, 1924, J. N. Wyman filed in the local office a protest against the said permit application, alleging in substance that the application and mineral waiver submitted in connection therewith were filed at the instance of the Marland Oil Company of Colorado for a consideration of \$500 paid to Clark, which payment was later supplemented by an agreement for a further consideration of \$1,428 to be paid upon the issuance of the permit; that said waiver and permit application and also a drilling and operating agreement between the Marland Oil Company and Clark with respect to the entered land, were designed to defeat and render ineffectual the terms of a certain oil and gas lease entered into February 4, 1924, by and between the entryman Clark and one Frank Delaney, for the use and benefit of the protestant, respecting the land embraced in Clark's entry; that the said money was wilfully paid to Clark by the Marland Oil Company for the purpose of inducing Clark to violate the terms of said lease; and that the entryman should not in equity and good conscience be permitted to take advantage of said acts, which were performed without the knowledge or consent of the protestant; that up to the time of the submission of final proof on the entry, the lands had not been classified as mineral lands and have not been reported by the Geological Survey as having any prospective value as oil or gas lands; that at the time of the filing of the permit application and mineral waiver, the entryman had acquired a right to an unrestricted patent to the land, including all oil and gas therein; and that the protestant had likewise, by virtue of his said lease, acquired a vested right to an interest in such oil and gas, and a vested right to drill for and remove the same; and that after the execution of said lease the entryman had no lawful right or authority to file a mineral waiver respecting the land. The protestant asked that a hearing be ordered to afford him an opportunity to establish the said charges; and prayed that it be adjudged that the mineral waiver is and was without any force and

effect as against the protestant; that an unrestricted patent be issued to the entryman; that the permit application be suspended pending determination of the case; and that upon the issuance of unrestricted patent, the said application be rejected.

By an undated tentative decision submitted to the Department for its approval October 4, 1924, you dismissed the protest of Wyman on the stated grounds that—

An entryman may, if he so desires, at any time before patent issues file a waiver of the oil and gas content to the United States under the act of July 17, 1914 (38 Stat., 509), and such a waiver when filed by an entryman in connection with an application for prospecting permit by him, renders unnecessary proceedings under paragraph 12(c) of circular No. 672 and a report from the Geological Survey as to the prospective value of the land for oil and gas. Such a waiver has been filed by entryman Clark and when considered in connection with the statements made in paragraph four of Wyman's protest that the Marland Oil Company through its agent paid the entryman Clark \$500 to file his consent to the reservation of the oil and gas content to the United States on June 13, 1924, 11 days after final proof had been received in your office, and before the same could have been examined in this office and the further statement relative to the payment of \$1428 to entryman Clark, it appears that the land may be patented if at all, only with a reservation of the oil and gas under the act of July 17, 1914 (38 Stat., 509), and in view thereof the protest filed by Wyman is hereby dismissed without the right of appeal and the case closed. If any valid contracts executed by the entryman have been breached by him the injured party may seek redress in the proper local courts.

There was also submitted to the Department at the same time, for execution, a proposed permit to Clark for the entire area embraced in a supplemental or amended application.

The Department concurs in your tentative decision dismissing the protest, as the allegations contained in the protest clearly show that at the time the final proof on Clark's entry was submitted, the land was known to be prospectively valuable on account of petroleum deposits, thus making it clear that the end sought to be attained by the protest, namely, the issuance to Clark of an unrestricted patent on the entry, could be accomplished only through the perpetration of a fraud upon the Government by depriving it of the oil deposits for which the land was known, prior to its admission of proof, to possess prospective value and which, under the circumstances, could not lawfully pass to Clark under his entry.

The Department, however, can not give its approval to your unqualified ruling to the effect that an entryman under the agricultural laws, may, if he so desires, file a waiver at any time before the issuance of patent on his entry, and thereupon himself seek a permit or lease for the land under the provisions of the leasing act. Such a rule would be applicable only in cases where the lawful rights of no other person respecting the land, acquired from the entryman

after the vesting in him of the equitable title thereto, would be affected. Nor can the Department concur in what appears to be the view expressed in your decision herein to the effect that an examination and approval by the General Land Office of final proof on a homestead entry is essential to the vesting of an equitable title, for the submission of final proof showing full compliance by an entryman with all the requirements of the law under which his entry is made, if unrefuted, and the payment of all the necessary fees and commissions, mark the time of the vesting in the entryman of an equitable title to the land, if of the class and character subject to the entry, regardless of the conditions existing at the time of the examination of the proof by the General Land Office. That principle is so well established that a citation of authorities to support it is here deemed unnecessary.

It is also to be noted that the proposed permit submitted to the Department for execution violates the rule that noncontiguous areas, to be subject to a single permit under section 13 of the leasing act, must be such as may be included in an area six miles square (Fred Mathews, 48 L. D., 239; Helen F. Curns, 50 L. D., 353), it here appearing that the east boundary of the easternmost of the noncontiguous tracts described in the proposed permit is approximately seven and a half miles distant from the west boundary of the westernmost of said area. For this reason the Department would not in any event be warranted in issuing a single permit covering the lands described in the instrument submitted to the Department for execution.

The case is accordingly remanded for appropriate action in harmony with the views herein expressed.

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### SCHOOL LAND GRANT—MINERAL INDEMNITY.

*Instructions, November 11, 1924.*

#### SCHOOL LAND—MINERAL LANDS—INDEMNITY—RESERVATION—SELECTION.

A State may select, subject to the reservations contained in the acts of June 22, 1910, April 30, 1912, and July 17, 1914, lands in designated school sections as indemnity for losses to the grant suffered on account of the mineral character of those sections, and it is immaterial whether the section selected or some other designated section lost to the grant be used as basis for the selection.

#### DEPARTMENTAL DECISION CITED AND APPLIED.

Case of State of Utah *v.* Olson (47 L. D., 53, 65), cited and applied.

*First Assistant Secretary Finney to the Commissioner of the General Land Office:*

Reference is made to your letter of September 27, 1924, recommending recognition of the right of the various States to satisfy their

school grants by selection of the granted sections of land in place, subject to the reservations contained in the acts of June 22, 1910 (36 Stat., 583), April 30, 1912 (37 Stat., 105), and July 17, 1914 (38 Stat., 509), where such sections are known to be mineral, of the character defined in those acts at the time the right of the State to such sections would otherwise attach; and that in selecting such section as indemnity, the State may use the same section as base.

In the grants to the States for school purposes, certain designated survey numbers of sections were mentioned, usually section 16 or 36, or both, and in some cases other designated sections. Such sections, however, do not pass to the State if known to contain mineral at the time when the grant would otherwise attach.

In order to indemnify the grant for such loss, provision was made for selection of other lands in lieu thereof. Originally, the right to select indemnity lands did not extend to tracts containing mineral, but in the acts above referred to provision was made whereby States are permitted to select lands containing coal, oil, or other minerals specified therein, subject to reservation of such mineral deposits to the United States.

The Department has heretofore recognized the right of a State to select tracts in the designated sections as indemnity, subject to such reservation, where they were lost to the grant, as sections in place on account of their mineral character. See *State of Utah v. Olson* (47 L. D., 58, 65).

In making such selection it is wholly immaterial whether the self same section selected be used as base or some other of the designated sections likewise lost as place lands. While such procedure seems to partake somewhat of the appearance of excessive formality, yet there is no authority under existing law whereby the grant may be made effective to any extent in any other manner as to mineral lands in the designated sections.

This is to confirm your view as to the propriety of the procedure outlined above.

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**RECORDS—NOTATION OF CANCELLATION OF OIL AND GAS PERMITS—CIRCULARS NOS. 929 AND 939, AMENDED.**

[Circular No. 966.]

DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE,  
*Washington, D. C., November 13, 1924.*

REGISTERS AND RECEIVERS,

UNITED STATES LAND OFFICES:

Referring to Circular No. 929 (50 L. D., 387), entitled "Notation of Cancellation of Oil and Gas Permits," approved April 23, 1924,

amended by Circular No. 939 (50 L. D., 509), approved May 28, 1924, you are further instructed as follows:

1. Where the cancellation of more than one permit becomes effective on the same day the land will be opened to applications for permits without regard to the particular areas embraced in each of the canceled permits; and where, in such cases, drawings are required, all allowable applications filed within the prescribed time for the areas opened should be included in a single drawing.

2. Where drawings are held, you will follow the procedure laid down by paragraph 4 of circular of May 22, 1914 (43 L. D., 254). You will issue your official receipt for the fees paid by each applicant, but apply only the fees paid by the successful applicants, returning by your official check the fees paid by the unsuccessful applicants, noting on the abstract of moneys returned or applied, opposite the check number, the word "drawing." Also note on the oil and gas applications the word "drawing" and the date, amount, and number of the check.

At the completion of a drawing, furnish this office a list of the applications involved therein, showing: (1) date of drawing, (2) description of the land involved, (3) names of successful applicants and serial numbers of applications, and (4) names of unsuccessful applicants and serial numbers of their applications.

WILLIAM SPRY,  
*Commissioner.*

Approved:

E. C. FINNEY,  
*First Assistant Secretary.*

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### SUMRALL v. CHANDLER.

*Decided November 13, 1924.*

#### ADJOINING FARM ENTRY—CULTIVATION—FINAL PROOF—CONTEST.

Cultivation of land of the original farm, formerly under cultivation, may be offered in proof of cultivation submitted in connection with an adjoining farm homestead entry.

FINNEY, *First Assistant Secretary:*

March 15, 1922, upon application filed in the Gainesville, Florida, land office, December 3, 1921, Wyatt E. Chandler was allowed to make second homestead entry for the E.  $\frac{1}{2}$  SW.  $\frac{1}{4}$ , Sec. 14, T. 24 S., R. 37 E., as an adjoining farm entry to 14 acres of adjacent farm land owned and occupied by him as a home.

Final commutation proof, submitted August 13, 1923, and the subsequently supplied final affidavit show that the entryman had

resided on the original farm since the inception of this entry and many years prior thereto. A 5-room dwelling, a barn and packing house, a stable and  $6\frac{1}{2}$  acres of cultivation on the original farm and three-fourths of an acre of cultivation on the adjoining farm entry were shown. About 6 acres of the cultivation on the original farm was in citrus fruit trees from which 500 boxes of fruit were produced and sold in 1922 and 900 boxes in 1923.

An affidavit of contest filed by Seaborn A. Sumrall January 7, 1924, was dismissed by the General Land Office, subject to the right to file an amendatory contest affidavit in which the charges should be made broad enough to include residence, improvements, and cultivation on the combined area of the original farm and the entered land. Following this action by the Commissioner, Sumrall filed a new contest affidavit upon allegations as follows:

Said entry was made as adjoining farm homestead entry, the original farm being 14 acres adjacent to the said E.  $\frac{1}{4}$  of SW.  $\frac{1}{4}$ , Sec. 14 aforesaid, total area 94 acres; that before making said entry said entryman had in cultivation 7 acres on his original farm on which he then and since has resided; that since making said entry said entryman has cleared and cultivated 1 acre additional on his original farm and  $\frac{1}{4}$  of an acre on the entered land, a total of  $8\frac{1}{4}$  acres now in cultivation on the entire area of 94 acres; that said entryman has failed to make the improvements and cultivation required by law since making entry.

The rejection of this contest by the local land office was affirmed by the Commissioner in decision dated August 16, 1924, it being held that the admitted area in cultivation ( $8\frac{1}{4}$  acres) is in excess of 1/16th of the combined area of the original farm and the entered land and, therefore, meets the legal requirements.

The contestant has appealed to the Department.

It is admitted in the contest affidavit that the entryman has a total of  $8\frac{1}{4}$  acres "now in cultivation on the entire tract of 94 acres," but the appellant contends that the law "requires new and additional cultivation upon either the original farm or the land entered, equivalent to 1/8th or 1/16th of the total area embraced in both original and additional entries." In other words it is appellant's contention that the cultivation, to meet the requirements, must be of new land outside of any area theretofore cultivated on either the original farm or the entered land. It is the view of the Department, however, that the mere fact that land was formerly under cultivation does not except it from the class that may be offered in proof of cultivation made in connection with an adjoining farm homestead entry. The proof of cultivation made since entry is sufficient to bring it within the law.

In this case the final proof shows, as stated, that the entryman in 1922 and 1923 cultivated on the original farm 6 acres of citrus fruit trees from which he produced and marketed 500 boxes of fruit in 1922 and 900 boxes in 1923. Doubtless this ground had been plowed and cultivated and planted to fruit trees before this entry was made but their continued cultivation was necessary in succeeding years for the growth and preservation of the trees and the production of a profitable crop. A fair and reasonable construction will permit the acceptance of such cultivation as a compliance with the law. The cultivation offered is sufficient to meet the requirements.

The affidavit does not state sufficient grounds of contest and the contest was properly dismissed.

The Commissioner's decision is affirmed.

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**LEASING OF LANDS ON THE FORT APACHE INDIAN RESERVATION,  
ARIZONA, CONTAINING METALLIFEROUS MINERALS.**

*Opinion, November 15, 1924.*

**INDIAN LANDS—FORT APACHE LANDS—MINERAL LANDS—COBALT—ASBESTOS—  
LEASE.**

The issuance of a lease conferring the right to mine all the metalliferous mineral deposits in a tract of land on the Fort Apache Indian Reservation, Arizona, pursuant to the act of June 30, 1919, as amended by the act of March 3, 1921, precludes the granting of a lease to another for the mining of any one or more of the minerals specified in those acts so long as the original lease is in effect.

**EDWARDS, Solicitor:**

My opinion has been requested in connection with an alleged discovery of cobalt by one H. W. Fowler on the Fort Apache Indian Reservation, Arizona, the precise question being whether persons other than the lessees under an existing lease can acquire any mining rights or privileges in these lands.

By section 26 of the act of June 30, 1919 (41 Stat., 3, 31), the Secretary of the Interior was authorized to lease unallotted lands within Indian reservations in nine of our western States, including Arizona, for the purpose of mining gold, silver, copper, and other valuable "metalliferous minerals", substantially under such rules and regulations as the Secretary of the Interior might prescribe. By an amendatory item in the act of March 3, 1921 (41 Stat., 1225, 1231), magnesite, gypsum, limestone, and asbestos, were brought within the term "metalliferous minerals" as used in the earlier

statute. Appropriate regulations governing operations under this legislation will be found in 47 L. D., 261, and 48 L. D., 263, 266.

Pursuant to the statutes and the regulations referred to on June 29, 1922, this Department approved a mining lease in favor of G. W. Adams and L. R. Jacobson, covering certain lands on the Fort Apache Indian Reservation embraced in claims locally known as "Horseshoe Nos. 1 and 2", containing an aggregate area slightly in excess of 38 acres. This lease was founded on a prior application alleging a valuable discovery of asbestos but when we turn to the lease itself we read from section one—

The lessor, for and in consideration of the royalties, covenants, stipulations, and conditions hereinafter contained, and hereby agreed to be paid, observed and performed by the lessee, doth hereby demise, grant, lease, and let unto the lessee for the term of 20 years with privilege of renewal for successive periods of 10 years upon such reasonable terms and conditions as may be prescribed by the lessor, unless otherwise provided by law at the time of the expiration of such periods, from the date of signing hereof by the lessor, for the purpose of mining *all the deposits of metalliferous minerals* in or under the following described lands. [Italics supplied.]

Cobalt is a metalliferous mineral and hence comes well within the class of deposits subject to lease under the act of June 30, 1919, *supra*. The lessees in the lease now here thereby obtained an exclusive right to mine "all the deposits of metalliferous minerals" in or under the lands covered thereby. Any person or persons, therefore, other than the present lessees, their agents or assigns, attempting to mine deposits of this nature within these lands would properly be regarded as trespassers. I am of the opinion that under the situation as it now stands, mining rights adverse to the present lessees can not be recognized or accorded by this Department.

It would be idle here, of course, to speculate on whether separate leases, with different lessees in each case, one for each of the different varieties of metalliferous minerals, would have been permissible under the statute referred to. Apparently such a procedure was not contemplated by the regulations as originally promulgated and in view of the multiplicity of "metalliferous minerals" the wisdom of considering such a course may seriously be questioned.

Approved:

F. M. GOODWIN,

*Assistant Secretary.*

**PROOFS UPON CLAIMS INITIATED UNDER THE DESERT LAND LAWS BY INCAPACITATED SOLDIERS—ACT OF DECEMBER 15, 1921.**

**INSTRUCTIONS.**

[Circular No. 805.]<sup>1</sup>

**DEPARTMENT OF THE INTERIOR,**  
**GENERAL LAND OFFICE,**  
*Washington, D. C., November 21, 1924.*

**REGISTERS AND RECEIVERS,**

**UNITED STATES LAND OFFICES:**

The act of December 15, 1921 (42 Stat., 348), amends the act of March 1, 1921 (40 Stat., 1202), by adding the following section:

Sec. 2. That any entryman under the desert-land laws, or any person entitled to preference right of entry under section 1 of the Act approved March 28, 1908 (Thirty-fifth Statutes at Large, page 52), who after application or entry for surveyed lands or legal initiation of claim for unsurveyed lands, and prior to November 11, 1918, enlisted or was actually engaged in the United States Army, Navy, or Marine Corps during the war with Germany, who has been honorably discharged and because of physical incapacities due to service is unable to accomplish reclamation of and payment for the land, may make proof without further reclamation thereof or payments thereon under such rules and regulations as may be prescribed by the Secretary of the Interior and receive patent for the land by him so entered or claimed, if found entitled thereto: *Provided, That no such patent shall issue prior to the survey of the land.*

The purpose of the amendment is to relieve from further compliance with the requirements of the desert-land law those persons physically incapacitated, as set forth therein, except as to submission of specified proofs.

2. The benefits of this amendment extend to persons who, prior to November 11, 1918, and during the war with Germany, were actually engaged in the United States Army, Navy, or Marine Corps, regardless of the date of their enlistment, provided they entered the service after having filed an effective desert-land application or made a desert-land entry for surveyed lands, or acquired a preference right to make entry under the desert-land laws of unsurveyed land, or took a desert-land entry by assignment, and who, having been honorably discharged, are unable to accomplish reclamation of and make payment for the land on account of physical disabilities due to such service.

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<sup>1</sup> This is a revision of Circular No. 805, approved February 3, 1922 (48 L.D., 427).—Ed.

3. If the land is unsurveyed and entry is not yet allowable, a claimant having a preference right of entry should file his application therefor on Form 4-274, accompanied by his sworn statement, corroborated by two persons having personal knowledge of the facts, setting forth in detail the date when he took possession of the land and what acts he performed thereon touching the matter of its reclamation and improvement. You will assign to the application the current serial number. Final proof may be submitted and accepted, but the final certificate will not issue until entry shall have been lawfully allowed, and adjustment to legal subdivisions made according to an approved survey.

4. Notice of intention to submit proof must be given in the usual manner by posting and publication; and in case of unsurveyed land, the notice of intention to submit proof must be posted thereon in a conspicuous place, and affidavit evidence must be filed showing such posting.

5. The proof shall consist (a) of affidavit of the claimant (taken before any officer at any place who is authorized to administer oaths and who uses an impression seal), showing that he is unable to return to the land on account of physical incapacity due to service in the United States Army, Navy, or Marine Corps during the war with Germany, and describing the nature and extent of such disability; (b) of the testimony of two witnesses taken in similar manner corroborating the statements in that regard and of these witnesses at least one must be a practicing physician; (c) of a certified copy of his discharge from the Army, Navy, or Marine Corps, or an affidavit showing all the facts regarding his service and discharge. In each case the facts will be verified so far as possible from the records of the War Department.

6. No payment of moneys will be required in connection with any application made, or proofs offered, other than testimony fees, when the testimony is taken before the register or receiver.

7. Where the proof appears satisfactory, and entry for the land has already been allowed, the register will issue the final certificate if there is no objection disclosed by the records. In cases where entry has not yet been allowed, all the papers will be forwarded to the General Land Office for consideration.

WILLIAM SPRY,  
*Commissioner.*

Approved:

E. C. FINNEY,  
*First Assistant Secretary.*

## EXTENT OF TITLE TO LANDS PATENTED AS MISSION CLAIMS ON INDIAN RESERVATIONS.

*Opinion, November 21, 1924.*

### STATUTORY CONSTRUCTION.

Supplemental acts relating to the same subject matter may properly be regarded as a legislative interpretation of prior acts.

### MISSION CLAIM—INDIAN LANDS—CROW CREEK LANDS—PATENT.

Notwithstanding that the Indian appropriation act of March 3, 1909, authorized the issuance of unrestricted fee simple patents to religious organizations engaged in mission or school work on Indian reservations, it is obvious that Congress intended by the later act of September 21, 1922, that patents issued after the latter date to such organizations for lands on Indian reservations should specify that the lands will revert to the Indian owners when no longer used for missionary purposes.

### EDWARDS, *Solicitor*:

My opinion has been requested in connection with the issuance of patents for certain lands on the Crow Creek Indian Reservation, South Dakota, heretofore set apart to the Protestant Episcopal Church for missionary purposes.

By the act of March 2, 1889 (25 Stat., 888), the great Sioux Reservation was carved up into a number of small reservations for sundry bands of the Sioux Tribe and a large part of their former claimed territory made available for homestead settlement and entry. Among the diminished reservations so created we find the one at Crow Creek (section 6 of the act). With reference to the entire area, however, from section 18 of the act we read:

That if any land in said Great Sioux Reservation is now occupied and used by any religious society for the purpose of missionary or educational work among said Indians, whether situate outside of or within the lines of any reservation constituted by this act, or if any such land is so occupied upon the Santee Sioux Reservation, in Nebraska, the exclusive occupation and use of said land, not exceeding one hundred and sixty acres in any one tract, is hereby, with the approval of the Secretary of the Interior, *granted* to any such society so long as the same shall be occupied and used by such society for educational and missionary work among said Indians; and the Secretary of the Interior is hereby authorized and directed to give to such religious society patent of such tract of land to the legal effect aforesaid. [*Italics supplied.*]

A provision of like tenor is to be found in the general allotment act of February 8, 1887 (24 Stat., 388, section 5), except that the latter carries no specific direction as to the issuance of patents for these so-called "church lands." Long before the enactment of these statutes various religious organizations had been zealously laboring among the Indians looking to their uplift in moral and other respects. Prior to March 2, 1889, the domestic and foreign missionary

society of the Protestant Episcopal Church had established a number of missions among the Sioux, including three on the Crow Creek Reservation at stations locally known as "St. John the Baptist," "All Saints Church," and "Christ Church." Substantial improvements, comparatively speaking, were erected and have since been maintained on these sites, in some cases being enlarged or rebuilt as the needs of the church might require.

On the extension of our public land system of surveys over the Crow Creek Reservation and an allotment in severalty to the Indians there, as provided for in the act of 1889, the areas occupied and used for missionary purposes were adjusted to such system of surveys and set apart to the respective organizations by placing appropriate descriptions of the lands so occupied and used on the allotment schedules, which schedules were duly approved here in 1895. On October 23, of that year, a patent was issued for the three mission sites herein above mentioned, embracing an aggregate area of 130 acres, in which patent, after reciting a description by legal subdivisions of these three missionary sites, the tenendum clause was made to read:

Now KNOW YE: That the United States of America, in consideration of the premises and in conformity with the eighteenth section of said Act of Congress approved March second, Eighteen hundred and Eighty-nine, and the order aforesaid, hereby agrees to *hold in trust* for the said "Domestic and Foreign Missionary Society of the Protestant Episcopal Church of the United States of America" the tracts of land above described so long as the same shall be occupied and used by such society for educational and missionary work among said Indians. [Italics supplied.]

Just why a "trust form" of patent was resorted to is not now entirely clear for when we turn to the particular section of the statute under which issued we find that the land so used and occupied was, with the approval of the Secretary of the Interior, to be "granted" to such societies or organizations as long as used for educational or missionary work among the Indians. Further, that a patent of "the legal effect aforesaid" was to be issued to such organizations. The usual form of documentary title evidencing a grant is a patent in fee and in the absence of legislative direction to the contrary very properly such a patent could have been issued to the church in this instance with an appropriate reversionary clause in the event that the lands ceased to be used for the purposes designated.

The church is now here asking for a patent in fee simple but whether with or without a reversionary clause is not definitely shown by the record now before me. In presenting the matter to the Department, however, the Commissioner of Indian Affairs invites attention to additional legislation dealing with the same subject-mat-

ter, and from the Indian appropriation act of March 3, 1909 (35 Stat., 781, 814), we read:

That the Secretary of the Interior is hereby authorized and directed to issue a patent in fee simple to the duly authorized missionary board, or other proper authority of any religious organization engaged in mission or school work on *any* Indian reservation, for such lands thereon as have been *heretofore* set apart to and are now being used and occupied by such organization for mission or school purposes. [*Italics supplied.*]

On September 21, 1922, however, a like measure was enacted (42 Stat., 994, 995), which provides—

Sec. 3. That the Secretary of the Interior is hereby authorized and directed to issue a patent to the duly authorized missionary board, or other proper authority, of any religious organization engaged in mission or school work on any Indian reservation for such lands thereon as have been heretofore set apart to and are now being actually and beneficially used and occupied by such organization solely for mission or school purposes, the area so patented to not exceed one hundred and sixty acres to any one organization at any station: *Provided*, that such patent shall provide that when no longer used for mission or school purposes said lands shall revert to the Indian owners.

It will be observed that the proviso in the legislation last referred to is of similar import to the obligation placed upon organizations of this character by section 18 of the act of March 2, 1889, *supra*. Further, that neither of these conditions or obligations appears in the act of March 3, 1909. As supplemental acts relating to the same subject matter may properly be regarded as a legislative interpretation of prior acts, I am of the opinion that we would not now be justified in issuing an unqualified fee patent to this church organization pursuant to the act of March 3, 1909, in utter disregard of the later legislation in the act of September 21, 1922. We now can, of course, in lieu of the outstanding trust patent which is with the record in the case, issue a patent in fee with a reversionary clause in the event that the lands described therein cease to be used for missionary or educational purposes, and this, under authority of the act of September 21, 1922. As previously pointed out, however, this is simply the character of patent that the church was entitled to in the first instance.

Approved:

F. M. GOODWIN,

*Assistant Secretary.*

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### RUST-OWEN LUMBER COMPANY (ON REHEARING).

*Decided November 24, 1924.*

#### PUBLIC LANDS—COURTS—VESTED RIGHTS—STATUTES.

Whenever the question arises in any court, State or Federal, as to whether the title to land, which had once been the property of the United States, has passed, that question must be resolved by the laws of the United

States; but when, according to those laws, the title shall have passed, then that property, like other property in the State, is subject to the laws of the State, so far as those laws are consistent with the admission that the title passed and vested according to the laws of the United States.

#### NAVIGABLE WATERS—RIPARIAN RIGHTS.

Upon the admission of a State into the Union the title to all lands under the navigable waters within the State inures to the State as an incident of sovereignty, and the laws of the State govern with respect to the extent of the riparian rights of the shore owners.

#### PUBLIC LANDS—PATENT—RIPARIAN RIGHTS.

With respect to public lands bordering on nonnavigable bodies of water, the Government assumes the position of a private owner, and when it parts with its title to those lands, without reservation or restriction, the extent of the title of the patentee to the lands under water is governed by the laws of the State within which the lands are situated.

#### SURVEY—FRAUD—LAKE—BOUNDARY—PUBLIC LANDS—RIPARIAN RIGHTS.

Where a survey was fraudulent or grossly inaccurate in that it purported to bound tracts of public lands upon a body of water, when in fact no such body of water existed at or near the meander line, the false meander line and not an imaginary line to fill out the fraction of the normal subdivision marks the limits of the grant of a lot abutting thereon, and, upon discovery of the mistake, the Government may survey and dispose of the omitted area as a part of the public domain.

#### FINNEY, *First Assistant Secretary*:

August 27, 1924, the Department upon recommendation of the Acting Assistant Commissioner of the General Land Office dismissed the protest of the Rust-Owen Lumber Company against the survey of lands omitted from the original survey of Secs. 20 and 29, T. 45 N., R. 7 W., 4th P. M., Wisconsin. A motion for rehearing has been filed by the company which claims ownership of the entire area in those two sections.

The original survey purported to meander a lake in the interior of those sections. The new survey returned 185.56 acres in Sec. 20 and 229.78 acres in Sec. 29 as lands omitted from the original survey. This area was represented on the original plat as one lake, but the new survey disclosed that there are two small lakes, one in the extreme northwest part of Sec. 20 and one in the extreme southeast part of Sec. 29, while a large body of land existed between the two lakes. This area is said to be of the same character as the adjoining lands, being from 3 to 70 feet above the elevation of the lakes and containing valuable timber except in places where the timber has been removed from the land. The facts in this regard are not in dispute. It is admitted that the facts stated in the former decision and the condition shown on the map of the resurvey are substantially accurate. The issue is confined to questions of law.

See 115 NW 1097 1936 S. 147  
85 NW 384  
51 NW 1132

As to Sec. 20 it is urged that the lots in the N $\frac{1}{2}$  thereof affected by the new survey are shown to have water boundaries reasonably answering the original survey and that it is not shown as to those lots that there was gross error or fraud in the original survey. In respect to the lots of S $\frac{1}{2}$ , Sec. 20, it is admitted that these lots have no water boundaries, but it is urged that by appropriate extension of the supposed water boundaries shown by the false meander line, all of the omitted area would be included in said subdivisions as extended. The same contention for the right to extend the side lines of the lots in search of a water boundary is also made in respect to the lots in Sec. 29, and it is further urged as regards that section that the protestant is owner of the entire section by virtue of transfer from the grantee under an act of Congress whereby the entire section was granted to the State of Wisconsin for railroad purposes.

The brief in support of the motion raises questions of far reaching importance and warrants very careful consideration. The central and vital thought thus presented for attention is directed to the proposed method for determination of the limits of a tract purported by the survey to bound upon a body of water, when in fact no such body of water existed at or near the meander line.

The contention of counsel in this regard may be succinctly presented by the following excerpt from their brief, being a quotation from the case of *Lally v. Rossman*, (82 Wis., 147; 51 N. W., 1132), viz:

It is well settled that in government grants meander lines are not boundaries, but the water course itself is the boundary. *Whitney v. (Detroit) Lumber Co.*, 78 Wis. 240, 47 N. W. Rep. 425, and cases cited. The *Whitney Case* is decisive of this case, and leaves little to be said. In that case it was held that where a lake was named as a boundary, and no lake in fact existed, the boundary must be the next eighth line. Applying that rule to this case, it is evident that plaintiffs' southern boundary is the eighth line, except where the river extends north of this line. Not finding their river boundary as called for by the patent, they may go in search of it to the next eighth line, but there they must stop.

Counsel plainly indicate the view that the rule for the interpretation of patents as applied in the State of Wisconsin is controlling of the question, but it is clear that the Wisconsin court did not rely on that principle. This is demonstrated by the leading decision of *Whitney v. Detroit Lumber Company*, *supra*, which affords the main support for the interpretation of the original survey in this case contended for by counsel. In that decision the supreme court of Wisconsin stated that the said court had repeatedly recognized the principle which was expressed in the language quoted from the decision of the Supreme Court of the United States in the case of *Wilcox v.*

Jackson (13 Pet., 498, 517). The principle thus favorably referred to by the Wisconsin court was the first proposition contained in the following sentence:

\* \* \* We hold the true principle to be this, that whenever the question in any court, state or federal, is, whether a title to land which had once been the property of the United States, has passed, that question must be resolved by the laws of the United States; but that whenever, according to those laws, the title shall have passed, then that property, like all other property in the state, is subject to the state legislation, so far as that legislation is consistent with the admission, that the title passed and vested according to the laws of the United States.

It appears, however, that while the Wisconsin court conceded the applicability and supremacy of the Federal laws in respect to the question there considered, nevertheless its ruling was not in harmony with the interpretation of those laws by the Supreme Court of the United States in many similar cases, as will be hereinafter shown.

Many early decisions of State courts have been found in the reports holding that the purchaser of a fractional subdivision of a section is entitled to and is limited by the area of a normal subdivision of the class purchased if such subdivision is capable of being filled by extension of the lines of the fractional subdivision as surveyed. This doctrine seems to have been drawn from the decision of the Supreme Court of the United States in the case of *Brown v. Clements* (3 How., 650). That decision, however, was later overruled in *Gazzam v. Phillips* (20 How., 372), and it is noted that the State of Michigan at least has conformed to the later rule. See *Grand Rapids Ice and Coal Company v. South Grand Rapids Ice and Coal Company* (60 N. W., 681). That decision states the following principles: Unless the contrary appears, a grant of land bounded by a water course conveys riparian rights, and the title of the riparian owner extends to the middle line of the lake or stream; that the shore proprietor takes by virtue of shore ownership, and his interest in the bed of the stream is acquired as appurtenant to the grant, and the extent of that interest depends upon his frontage, and the form, length and breadth of the body of water upon which he abuts. This is in substantial accord with the doctrine announced in the case of *Hardin v. Jordan* (140 U. S., 371). The latter decision held that the Government parts with its title to lands in the beds of nonnavigable waters when it patents, without reservation or restriction, the abutting surveyed tracts, and that the law of the State where the land lies governs the extent of the title of the patentee in respect to the land under water.

In the case of navigable bodies of water, it has been recognized since *Pollard v. Hagan* (3 How., 212), that the land under such

water inures to the State as an incident of sovereignty, and in *Barney v. Keokuk* (94 U. S., 324), it was held that if the State choose to resign to the riparian proprietor the title to the bed of such waters, the law of the State governs in that particular.

In *Hardin v. Shedd* (190 U. S., 508), the court was particular in stating its position as to the effect of patents for lands bordering upon either navigable or nonnavigable bodies of water, and to show the distinction between the two classes. It was held that the title passes from the Government in either case. In the case of navigable waters the submerged land does not belong to the Federal Government, having passed to the State by its admission to the Union. In the case of land bounded on nonnavigable waters, the United States assumes the position of a private owner subject to the general law of the State, so far as its conveyances are concerned. In either case the effect of the grant on the title to the submerged land will depend upon the law of the State where the land lies.

These are general rules predicated on correct surveys. Different principles apply where the survey was fraudulent or grossly inaccurate. Perhaps no better statement of the law in compact form in respect to this question can be found than the summary made by Chief Justice White in the case of *Lee Wilson and Company v. United States* (245 U. S., 24, 29), wherein it was said:

\* \* \* As a means of putting out of view questions which are not debatable we at once state two legal propositions which are indisputable because conclusively settled by previous decisions.

*First.* Where in a survey of the public domain a body of water or lake is found to exist and is meandered, the result of such meander is to exclude the area from the survey and to cause it as thus separated to become subject to the riparian rights of the respective owners abutting on the meander line in accordance with the laws of the several States. *Hardin v. Jordan*, 140 U. S. 371; *Kean v. Calumet Canal Co.*, 190 U. S. 452, 459; *Hardin v. Shedd*, 190 U. S. 508, 519.

*Second.* But where upon the assumption of the existence of a body of water or lake a meander line is through fraud or error mistakenly run because there is no such body of water, riparian rights do not attach because in the nature of things the condition upon which they depend does not exist and upon the discovery of the mistake it is within the power of the Land Department of the United States to deal with the area which was excluded from the survey, to cause it to be surveyed and to lawfully dispose of it. *Niles v. Cedar Point Club*, 175 U. S. 300; *French-Glenn Live Stock Co. v. Springer*, 185 U. S. 47; *Security Land & Exploration Co. v. Burns*, 193 U. S. 167; *Chapman & Dewey Lumber Co. v. St. Francis Levee District*, 232 U. S. 186.

Examination of the several decisions above cited will disclose that the court did not concern itself with imaginary lines to fill out fractions of normal subdivisions. If the survey correctly meandered the body of water, the sale of an abutting lot disposed of the

Government's interest in the land; but if the survey was fraudulent or grossly inaccurate, then the meander line was the boundary of the tract and no riparian rights whatever attached. *French-Glenn Live Stock Company v. Springer* (185 U. S., 47), was a case much like the one under consideration, and the following quotation from that decision (page 52) is pertinent to this, viz:

\* \* \* But if there never was such a lake—no water forming an actual and visible boundary—on the north end of the lots, it would seem unreasonable, either to prolong the side lines of the survey indefinitely until a lake should be found, or to change the situs of the lots laterally in order to adapt it to a neighboring lake. The jury having found that the facts under this issue were as claimed by the defendant in error, the conclusion must be that the rights of the plaintiff in error must be regarded as existing within the actual lines and distances laid down in the survey and to the extent of the acreage called for in the patents, and that the meander line was intended to be the boundary line of the fractional section.

In *Niles v. Cedar Point Club* (175 U. S., 300, 306), Justice Brewer, speaking for the court, said:

It may be that surveyor Rice erred in not extending his surveys into this marsh, but his error does not enlarge the title conveyed by the patents to the surveyed fractional sections. The United States sold only the fractional sections, received only pay therefor, an amount fixed by the number of acres conveyed, and one receiving a patent will not ordinarily be heard to insist that by reason of an error on the part of the surveyor more land was bought than was paid for, or than the Government was offering for sale.

See also *Hatcher et al.* (49 L. D., 452), and cases there cited.

Sufficient has been said to show the fallacy of the argument as regards the omitted lands in Sec. 20, and the same applies to Sec. 29, but title to the latter section is also claimed under a grant of odd sections for railroad purposes. The Department is not disputing the equitable title of the railroad company or its transferee to all of Sec. 29 under the grant, but the patent conveyed legal title to the surveyed land only, and it is the duty of the Department, and it would seem also to be to the interest of claimant, to have the omitted area surveyed and patent properly issued. In this regard it would appear that counsel are laboring under a misapprehension as to the nature of this proceeding. It is not primarily one for determination of title or equitable rights. That will be appropriate for consideration when the survey plats shall have been filed. The present issue involves merely the propriety of the supplemental survey.

The Department must adhere to its former decision, and the motion is accordingly denied.

**APPLICATIONS UNDER ACT OF JANUARY 27, 1922, FOR EXCHANGE OF ENTRIES.****ADMINISTRATIVE RULING.**

[Circular No. 967.]

ALL 48210 595

DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE,  
*Washington, D. C., December 3, 1924.*

REGISTERS AND RECEIVERS,

UNITED STATES LAND OFFICES:

Under date of December 2, 1924, the Secretary of the Interior issued the following Administrative Ruling:

The act approved January 27, 1922 (42 Stat., 359), provides that in all cases where a final entry of public lands has been or may be hereafter canceled, and such entry is held by the Land Department or by a court of competent jurisdiction to have been confirmed under the proviso to section 7 of the act of March 3, 1891 (26 Stat., 1099), if the land has been disposed of to or appropriated by a claimant under the homestead or desert-land laws, or patented to a claimant under other public-land laws, the Secretary of the Interior is authorized, in his discretion, and under rules to be prescribed by him, to change the entry and transfer the payment to any other tract of surveyed public land, nonmineral in character, free from lawful claim, and otherwise subject to general disposition, provided that the entryman, his heirs, or assigns shall file a relinquishment of all right, title, and interest in and to the land originally entered. The act contains an inhibition against assigning or transferring any right or claim under the provisions of the act.

The debates in Congress, when the measure was pending, indicate that the object of the act was to afford protection to those persons who had entered the land after the cancellation of an entry as the result of proceedings instituted more than two years after the issuance of the receiver's receipt on final entry. In view of which, and of the discretion vested in the Secretary of the Interior by the act, and considering, also, that beneficiaries have had almost three years within which to present their claims, all applications thereunder filed after the date hereof will be treated as stale claims and rejected unless it appears that the statute of limitations of the State wherein the entered land is situated does not bar an action by the entryman, his heirs, or assigns to have the present holder of the land declared a trustee thereof.

Applications under the act involving two or more incontiguous tracts will not be approved unless none of the tracts is part of an area approximately equal to that embraced in the canceled entry, and subject to entry.

One application under the act, even if for an area less than that to which the claimant is entitled, exhausts his rights under the act.

WILLIAM SPRY,  
*Commissioner.*

**MINNESOTA DRAINAGE LAWS—PROCEEDINGS AFTER EXPIRATION OF PERIOD OF REDEMPTION.**

**Instructions.**

[Circular No. 969.]

DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE,  
*Washington, D. C., December 9, 1924.*

**REGISTERS AND RECEIVERS,**

**CASS LAKE, CROOKSTON, AND DULUTH, MINNESOTA:**

The following instructions are issued under the act of May 20, 1908 (35 Stat., 169), known as the Volstead Act, being supplemental to Circular No. 470, approved April 15, 1916 (45 L. D., 40), and the instructions dated August 13, 1918 (46 L. D., 438), relating to proceedings after expiration of the period of redemption.

September 4, 1924, the State auditor of Minnesota was asked for an opinion upheld by decisions rendered by the courts of said State bearing upon the question of whether an entryman under certain circumstances specified in the letter has the right of redemption under the State laws relative to taxation. October 7, 1924, the assistant attorney general of Minnesota, to whom this matter was referred by the auditor, rendered an opinion covering the points in question. From the acts of the State of Minnesota bearing on this matter and the decisions of the State courts referred to, it is found that evidence of redemption must be furnished in cases where land has been sold for drainage charges under the act of May 20, 1908:

- (1) When the State is a purchaser and there has been no assignment.
- (2) When the State purchased the land, but later assigned it and six years have not expired since date of assignment.
- (3) Where there is an actual purchaser, and six years have not expired since date of sale.

In the future you will reject any and all applications for homestead entry subject to the act of May 20, 1908 (35 Stat., 169), where evidence of redemption is required if the same is not filed in connection therewith.

WILLIAM SPRY,  
*Commissioner.*

Approved:

E. C. FINNEY,

*First Assistant Secretary.*

## TALITHA A. FORAN ET AL.

*Decided December 16, 1924.*

## SURVEY—PLAT—FOREST HOMESTEAD—RELINQUISHMENT.

A survey which sets apart as a unit a tract of land for a forest homestead entry, does not supersede the township survey if the land thereafter becomes subject to appropriation, but it may be subsequently entered by legal subdivisions in accordance with the township plat.

FINNEY, *First Assistant Secretary*:

Talitha A. Foran and Emmet W. Foran have appealed from a decision of the Commissioner of the General Land Office dated July 30, 1924, holding for cancellation the additional entry of Talitha A. Foran, Rapid City 040599, and the original entry of Emmet W. Foran, Rapid City 040600.

The record discloses that on November 9, 1918, Talitha A. Foran made entry of a tract of land in the Harney National Forest described as follows:

Those portions of the NE.  $\frac{1}{4}$  NE.  $\frac{1}{4}$  and the N.  $\frac{1}{2}$  SE.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ , not included in H. E. S. No. 190, Sec. 9; SW.  $\frac{1}{4}$  NW.  $\frac{1}{4}$ , SE.  $\frac{1}{4}$  NW.  $\frac{1}{4}$  NW.  $\frac{1}{4}$ , that portion of the W.  $\frac{1}{2}$  W.  $\frac{1}{2}$  NE.  $\frac{1}{4}$  NW.  $\frac{1}{4}$ , not included in H. E. S. No. 153; that portion of SE.  $\frac{1}{4}$  NW.  $\frac{1}{4}$  west of mineral survey No. 628, patented; the unappropriated portion of the NW.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , Sec. 10, T. 3 S., R. 4 E., B. H. M., 122 acres. List 2-2247.

On April 10, 1924, she made additional entry, Rapid City 040599, under the act of April 28, 1904 (33 Stat., 527), for the SW.  $\frac{1}{4}$  NW.  $\frac{1}{4}$  NW.  $\frac{1}{4}$ , NE.  $\frac{1}{4}$  NW.  $\frac{1}{4}$  NW.  $\frac{1}{4}$ , Sec. 10, E.  $\frac{1}{2}$  SW.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , Sec. 3, T. 3 S., R. 4 E., B. H. M., same being a part of H. E. S. No. 314, except a conflict in Sec. 3 by H. E. S. No. 153, List No. 2-2247, said entry containing 39 acres. On June 10, 1924, she submitted final proof on both entries. On May 22, 1924, the district forester addressed a communication to the local officers advising them that the Forest Service had no protest to make against the issuance of patent for the land involved.

On April 10, 1924, Emmet W. Foran made entry, Rapid City 040600, for lands in said forest embraced in lists 2-192, 2-3024, 2-2262, and described as follows: Lot 7, SW.  $\frac{1}{4}$  NW.  $\frac{1}{4}$ , NW.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , and W.  $\frac{1}{2}$  SW.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , Sec. 3, and the unappropriated portions of the E.  $\frac{1}{2}$  NE.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ , E.  $\frac{1}{2}$  E.  $\frac{1}{2}$  SE.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ , E.  $\frac{1}{2}$  E.  $\frac{1}{2}$  NE.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , Sec. 4, T. 3 S., R. 4 E., B. H. M.

Upon consideration of the record the Commissioner held for cancellation the additional entry of Mrs. Foran and also the original entry of her son Emmet for the reason that each entry embraced a part of H. E. S. No. 314, a tract of 157.32 acres which he held must be entered in its entirety and as a unit of entry.

The record has been examined and the Department can not concur in the action taken by the Commissioner. It appears that H. E. S. No. 314 was made upon the application of one, Crabtree, who made entry of the land embraced therein but relinquished same and it was thereafter applied for by one, Eller, who never submitted final proof and the land involved now appears to be vacant, unappropriated public land, entry of which the Forest Service has acquiesced in. While H. E. S. No. 314 set apart the land desired by Crabtree into a unit embracing 157.32 acres and Crabtree could thereby make homestead entry of same according to such survey, said survey did not supersede the township survey in so far as the rights of others were concerned to enter the land or portions thereof under either an additional or original homestead right, based upon a description from the township plat of survey, in the event Crabtree or any other qualified applicant failed to apply for the land under H. E. S. No. 314 or after applying therefor failed to prosecute such application and abandoned the land. While for the purposes of administration it would be more desirable for the land in H. E. S. No. 314 to be entered as a unit, no valid reason is seen why portions thereof may not be entered by qualified applicants according to the township plat of survey. The objection urged by the Commissioner to the allowance of applications like this, is an administrative and not a legal one, and where, as here, all the land embraced in a homestead entry survey has been entered, and no conflicts exist, the administrative objection disappears.

The question of the sufficiency of the final proof submitted by Mrs. Foran or the disposition to be made of protests by mineral applicants appearing in the record is not before the Department but only the question as to the correctness of the Commissioner's action in holding for cancellation the instant entries, and as to his action in that respect it is the opinion of the Department that the Commissioner erred. It will be necessary to authorize a supplemental plat before patent issues.

The decision appealed from is reversed.

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**JAMES C. REED ET AL.**

*Decided December 16, 1924.*

**MINERAL LANDS—WITHDRAWAL—SECTION 2319, REVISED STATUTES.**

Only where the United States has indicated that mineral lands are held for disposal under the land laws does section 2319, Revised Statutes, apply, and it is never applicable where the United States directs that the disposal be only under other laws.

## MINERAL LANDS—MINING CLAIM—WITHDRAWAL—RECLAMATION—SECRETARY OF THE INTERIOR.

A first-form withdrawal by the Secretary of the Interior under authority of the act of June 17, 1902, of lands which, in his judgment, are required for irrigation works, is effective to preclude thereafter location under the mining laws of lands within the designated limits.

## DECISIONS AND INSTRUCTIONS APPLIED.

Cases of *Oklahoma v. Texas* (258 U. S., 574), and *King v. Bradford* (31 L. D., 108), cited and applied; instructions of January 13, 1904 (32 L. D., 387), applied.

FINNEY, *First Assistant Secretary*:

On December 31, 1923, the Director of the National Park Service called attention to the mineral location known as the Hole in the Rock No. 1 placer mining claim located by James C. Reed *et al.* on the SE.  $\frac{1}{4}$ , Sec. 4, T. 1 N., R. 4 E., G. & S. R. M., Arizona, within the Papago Saguaro National Monument and requested an investigation of the validity of the mining claim.

Notice of location on March 26, 1912, by Reed and seven others of a "valuable mineral deposit other than in veins or lodes of quartz or other rock in place" was recorded in Maricopa County, March 28, 1912. An amended notice of location was recorded April 7, 1913. Reed in his affidavit of May 17, 1924, states that the claim was located upon the discovery of clay on the land and that several buildings in Phoenix were built with brick made from said clay.

It appears that the said SE.  $\frac{1}{4}$ , Sec. 4, was included in a withdrawal of lands from all disposal by the Secretary of the Interior July 2, 1902, in connection with the Salt River Project. The withdrawal was changed August 26, 1902, to a second-form reclamation withdrawal. The withdrawal of the tract in question was again changed to first-form December 4, 1908. The tract was included in the national monument which was created by proclamation of January 31, 1914 (38 Stat., 991).

An investigation was made by a mineral examiner of the General Land Office who on June 13, 1924, submitted an exhaustive report on the mineral content of the land and the validity of the claim. However, no action has been predicated on the report. The Commissioner by decision of August 21, 1924, referred to the record fact that the tract was withdrawn from all forms of disposal December 4, 1908, under a first-form reclamation withdrawal which remains in force being prior to the date of the attempted location of the mineral claim on March 26, 1912, and held the location for cancellation.

On October 8, 1924, Reed filed a letter in which he reasserted his possessory right to the mineral claim. Said letter has been forwarded as an appeal from the Commissioner's decision.

See 43 14 232

30 20 515

The case involves the question of the right of persons to locate mineral claims on lands withdrawn by the Secretary of the Interior from all forms of disposal under first-form reclamation withdrawals.

Section 2319, Revised Statutes, provides:

All valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States.

The value of the mineral deposit of clay is very doubtful. Furthermore, ordinary brick clay is not a mineral deposit within the meaning of the mining laws. See *King v. Bradford* (31 L. D., 108). There is no doubt that the tract in question belongs to the United States. The Supreme Court of the United States had occasion to consider this section of the Revised Statutes in the case of *Oklahoma v. Texas* (258 U. S., 574, 599), wherein it was held that part of the so-called Red River lands are valuable mineral lands belonging to the United States but not subject to exploitation under the mining laws. Mr. Justice Van Devanter states in the opinion that—

Only where the United States has indicated that the lands are held for disposal under the land laws does the section apply; and it never applies where the United States directs that the disposal be only under other laws.

Lands withdrawn under first-form reclamation withdrawals are withdrawn from all disposal and are dedicated and set aside for the use of the project. The Department by instructions of January 13, 1904 (32 L. D., 387), held (syllabus):

Withdrawals made by the Secretary of the Interior under authority of the act of June 17, 1902, of lands which in his judgment are required for irrigation works contemplated under the provisions of said act, have the force of legislative withdrawals and are therefore effective to withdraw from other disposition all lands within the designated limits to which a right has not vested.

This holding has been consistently followed by the Department.

At the date of the first-form reclamation withdrawal Reed and his associates had no vested rights to the tract or to any minerals and none has been since acquired. The tract was not subject to location under the mining laws and therefore the attempted location was illegal and void, of no effect and conferred no rights on the locators or their assigns. See *Oklahoma v. Texas* (258 U. S., 574, 602).

The Commissioner's decision is affirmed.

## SAMUEL S. C. CHILCOTE AND PETER J. SMITH.

*Decided December 20, 1924.*

## OIL AND GAS LANDS—PROSPECTING PERMIT—APPLICATION—NOTICE—BOUNDARIES.

Where a single application for an oil and gas prospecting permit is for incon-  
tiguous tracts, the erection of a notice upon each tract with a description  
of the land is required to fulfil the provision of section 13 of the act of  
February 25, 1920, if the lands be surveyed, but, if unsurveyed, the  
corners of each tract must be monumented.

FINNEY, *First Assistant Secretary*:

In the above-entitled case, Samuel S. C. Chilcote has appealed  
from the decision of the Commissioner of the General Land Office  
of July 7, 1924, holding for rejection, in part, his application (Buf-  
falo 020721), filed February 24, 1923, for an oil and gas prospecting  
permit because it included lands embraced in a like prospecting  
permit application (Buffalo 020778), filed March 15, 1923, by one  
Peter J. Smith, who claimed preference by reason of having posted  
appropriate notice on the land February 14, 1923. Chilcote does  
not claim preference, but relies solely upon his application.

It appears that the land applied for by Chilcote and Smith re-  
spectively comprises three separate, detached tracts, the extreme  
limits of which are a little more than four miles apart; that as to  
two of these tracts it is not claimed that any notice whatsoever of  
appropriation was erected on the land by Smith, and as to the third  
tract, it is established that the notice was posted on land covered  
by the permit application, since allowed, of third parties. This  
third tract was, however within the exterior limits of a larger tract  
applied for in its entirety by Smith for prospecting purposes.

Section 13 of the general leasing act of February 25, 1920 (41  
Stat., 437), gives a preference right over others to a prospecting  
permit if the permit applicant—

shall cause to be erected upon the land for which a permit is sought a monu-  
ment not less than four feet high, at some conspicuous place thereon, and  
shall post a notice in writing on or near said monument, stating that an ap-  
plication for permit will be made within 30 days after date of posting said  
notice, the name of the applicant, the date of the notice \* \* \*

The Department has construed the act as authorizing the issuance  
of permits for inconiguous tracts within a general area of six miles  
square. The act is worded to deal with single tracts, but a reason-  
able interpretation thereof requires such monumenting and mark-  
ing of boundaries as will accomplish the plain purpose of Congress  
to give notice of claims made. In cases where the lands are sur-  
veyed and survey monuments are plainly visible on the ground,  
the erection of notices upon each tract, with a description of the  
land, is held necessary to meet the requirements of the act. Less

than this would not do so. Where the lands involved have not been surveyed, notices are required to be posted and the corners of each tract marked. The Department has recently held that four monuments placed at the outermost corners of a group of tracts scattered over an area six miles square, "or one much smaller," would be "wholly inadequate to serve as notice to all persons viewing the lands of their prior disposal."

In the case at bar, the three tracts respectively claimed by Smith and Chilcote are separated from each other by lands claimed by neither of them. Accordingly, a notice erected on the tract, could not inure to the benefit of, or have efficacy in connection with, either or both of the other tracts desired.

Accordingly, the application of Smith will be rejected as to the two tracts on which he failed to post a notice, namely (1) the E.  $\frac{1}{2}$  SE.  $\frac{1}{4}$ , Sec. 9, W.  $\frac{1}{2}$  W.  $\frac{1}{2}$ , Sec. 10, and NW.  $\frac{1}{4}$  NW.  $\frac{1}{4}$ , Sec. 15, and (2) the S.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , N.  $\frac{1}{2}$  SE.  $\frac{1}{4}$ , and SE.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , Sec. 15, all in T. 48 N., R. 82 W., Buffalo, Wyoming, land district, and, in the absence of other objection not here appearing, the application of Chilcote therefor will be accepted. As to the third tract above mentioned, namely, the SW.  $\frac{1}{4}$ , Sec. 7, NW.  $\frac{1}{4}$  and N.  $\frac{1}{2}$  SE.  $\frac{1}{4}$ , Sec. 18, the application of Smith will be approved, in the absence of other objection not here appearing, since it is part and parcel of the larger tract upon which it appears he placed a monument and notice as required by section 13 of the act.

The decision appealed from is modified accordingly.

## RIGHT OF A STATE TO TAX LANDS PATENTED IN FEE TO INDIAN ALLOTTEES PRIOR TO THE EXPIRATION OF THE TRUST PERIOD.

*Opinion, December 24, 1924.*

INDIAN LANDS—COLVILLE LANDS—ALLOTMENT—PATENT—TAXATION—VESTED RIGHTS—EXEMPTION—WAIVER.

While the exemption from taxation for a definite period acquired by an Indian allottee under a trust patent is a vested right of which he can not be deprived without his consent, yet, where he voluntarily applies for and obtains a patent in fee simple under the act of May 8, 1906, he thereby waives his right to the exemption from taxation during the remainder of the original trust period.

COURT DECISION CITED AND APPLIED.

Case of *Sweet v. Shock* (245 U. S., 192), cited and applied.

EDWARDS, *Solicitor*:

My opinion has been requested in connection with the question of taxation by the State of Washington against lands allotted to In-

dians of the Colville Reservation where the allottees applied for and received patents in fee simple prior to the expiration of the original trust period.

From the record presented it appears that some 500 allottees on this reservation have heretofore received patents in fee and that of those who still retain title some have voluntarily paid the taxes thereon while others have refused so to do on the ground that such lands are not taxable by the State until the full 25-year period called for by their original trust patents has expired.

By the act of July 1, 1892 (27 Stat., 62), Congress provided for allotments in severalty to the Indians and the disposal of the surplus unallotted lands within that part of the Colville Indian Reservation commonly referred to as the "north half." By the act of March 22, 1906 (34 Stat., 80), a practically similar disposal was provided for with reference to lands within the diminished or "south half" of this reservation. Both acts, after providing for an allotment of 80 acres to each Indian, substantially directed the issuance of patents in accordance with the general allotment act of February 8, 1887 (24 Stat., 388). This in turn (section 5) calls for patents under which the United States declared that it would hold the lands so allotted in trust for 25 years for the benefit of the allottee or in case of death, of his heirs, and that at the expiration of said period it would convey the lands in fee to the allottee or to his heirs as the case might be "free from any charge or incumbrance whatsoever." In other words, our familiar 25-year trust patent, which, so long as the land remained in that status, operated as an effective bar against taxation by the State. See *United States v. Thurston County, Nebraska, et al.* (143 Fed., 287). As the period of the trust is to be calculated in each instance from the date of the primary or trust patent, necessarily this will vary as to individual allottees but for our present purposes it is sufficient to state that trust patents on the north half of the Colville Reservation were issued mainly under date of July 31, 1900; those for allotments on the south half bearing date mainly of April 13, 1917. Hence, the 25-year trust period has not expired, by lapse of time, in any instance.

Congress, however, on May 8, 1906 (34 Stat., 182), amended the general allotment act in several respects, with which we are here concerned to the extent only of that proviso which reads in part (page 183):

That the Secretary of the Interior may, in his discretion, and he is hereby authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple and thereafter all restrictions as to sale, incumbrance, or *taxation* of said land shall be removed and said land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent. [Italics supplied.]

For a considerable period the view prevailed rather generally that inalienability and nontaxability as applied to allotted Indian lands were coexistent factors, or, in other words, that as soon as restrictions are removed the lands then become subject to taxation. Evidently Congress entertained a like view for in several measures pertaining to such matter that body attempted, as it did in the act of May 8, 1906, *supra*, to couple taxability with a removal of the restrictions against alienation. See act of June 21, 1906 (34 Stat., 325, 353), relating to allottees on the White Earth Reservation, Minnesota, and the act of May 27, 1908 (35 Stat., 312), relating to the Five Civilized Tribes in Oklahoma. In 1912, however, the Supreme Court of the United States, after pointing out that alienability and taxability are separate and distinct subjects, laid down the rule, substantially, that while Congress could remove the restrictions against alienation whenever it saw fit so to do, yet where an Indian has once obtained a vested right of exemption from taxation for a definite period it is thereafter beyond the power of Congress, by statute, to deprive the Indian of that right without his consent. See *Choate v. Trapp* (224 U. S., 665, 673). To the same effect is the decision by the Eighth Circuit in *Morrow v. United States* (243 Fed., 854), involving allottees of the White Earth Reservation, Minnesota. See also 49 L. D., 348, 352, wherein it was pointed out that a removal of restrictions, within itself, does not deprive the Indian of any property right but simply enlarges his privilege of dealing with the lands allotted to him which he could thereafter retain, incumber, or dispose of, as he might see fit. Enlargement of personal privileges are matters of which one can hardly be heard to complain, but when we attempt to couple this with an invasion of a vested property right we confront a different situation. If it is beyond the power of Congress to invade a property right resting in the Indian, surely it is likewise beyond the power of an administrative officer, by the issuance of a patent in fee prior to the expiration of the trust period, without the consent of the Indian, to deprive him of a right which has once vested. In other words, his lands can not thus be made subject to taxation without his consent. See *Benewah County, Idaho v. United States* (290 Fed., 628).

We are not here greatly concerned, however, with those comparatively few cases where patents in fee have issued without the consent of the Indian. For, as indicated in the opening paragraph, the question now here deals only with those Indians who applied for and received patents in fee simple prior to the expiration of the original trust period provided for in the primary or trust patents issued to them. This brings into view a somewhat different situation, and one with respect to which there can be but little if any doubt.

Where an allottee voluntarily applies for a removal of restrictions prior to the expiration of the period of exemption originally provided for, the granting of such application subjects the lands to taxation even in the hands of the original allottee. See *Sweet v. Shock* (245 U. S. 192, 196-7). The application for removal of restrictions or, as in this case, the issuance of a patent in fee, being wholly voluntary on the part of the Indian, he takes title subject to the terms, conditions, and limitations of the statute under which the application is granted. In other words, he can not embrace the benefits of a statute and at the same time escape the responsibilities or liabilities arising hereunder. In so far as allottees on the north half of the Colville Indian Reservation are concerned the fact that such lands after issuance of a patent in fee became taxable is fortified by that legislative declaration in the act of July 1, 1892, *supra*—the very act under which they received their lands in severalty—which declares—

That such allotted lands shall be subject to the laws of eminent domain of the State of Washington, and shall, when conveyed in fee simple to the allottees or their heirs, be subject to taxation as other property in that State.

Aside from the legislative declaration just mentioned, however, I am of the opinion that when an Indian allottee applies for and receives a patent in fee simple pursuant to the act of May 8, 1906, *supra*, even prior to the expiration of the original trust period, such lands then become subject to taxation.

In connection with this matter the Commissioner of Indian Affairs invites attention to section 2 of the act of July 1, 1892, *supra*, in which Congress authorized the Secretary of the Interior, in his discretion, to use part of the proceeds derived from the sale of surplus lands within the north half of the Colville Indian Reservation to pay such part of the local taxes as might properly be chargeable against the lands allotted to these Indians "so long as such allotted lands shall be held in trust and exempt from taxation." Having found that the issuance of a patent in fee not only terminates the trust but also subjects the land to taxation, this feature of the situation is not of great materiality here. It may be observed, however, that by the act of June 7, 1924 (43 Stat., 599), Congress has directed payment to Stevens and Ferry Counties, Washington, of some \$115,767 in lieu of taxes against lands allotted to Indians on the Colville Reservation pursuant to section 2 of the act of July 1, 1892, *supra*, but this is to be used, of course, only in settlement, ratably, of taxes denied to the State where the lands so allotted are still "held in trust" and therefore exempt.

Approved:

F. M. GOODWIN,

*Assistant Secretary.*

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15. A coal declaratory statement which is not filed within sixty days from the accrual of a preference right as required by section 2349, Revised Statutes, but which is presented within the ensuing year, affords the declarant, in the absence of an intervening adverse right asserted at the time of the filing or other disposition of the land, the same security for the period specified in the statute as if it had been filed in time..... 300

16. The acts of one in taking and maintaining possession of a tract of public land and opening a mine of coal thereon, coupled with acts of the local officers in accepting his application to purchase, permitting publication and proof, and requiring payment of the purchase price, constitutes an appropriation of the land, duly recognized and noted of record, sufficient to preclude the subsequent allowance of a homestead entry..... 300

17. The erroneous allowance of a homestead entry, subsequently canceled because of want of citizenship qualification of the entryman, does not affect the surface rights of an applicant to purchase the land under the coal-land laws who had, prior to the cancellation, appropriated the land by taking and maintaining possession thereof and opening a mine of coal thereon..... 300

18. Rights acquired by the filing of a coal prospecting permit application, prior in time, which the local officers suspended for further showing on the part of the applicant, are not defeated by the filing of an application by another where the defect was afterwards cured by an amendatory application and the first applicant was not chargeable with laches..... 318

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19. The issuance of a coal prospecting permit, which is merely a license, under the act of February 25, 1920, is discretionary with the Secretary of the Interior, and such permit will be issued only where prospecting is necessary to show either the existence or workability of coal deposits..... 342
20. While the Department may, and occasionally does, issue permits pursuant to the act of February 25, 1920, to prospect unappropriated land even though the evidence before it does not appear to warrant prospecting, yet, where an adverse claim exists, a permit will be issued only upon a clear showing that the land has prospective mineral value..... 343
21. Where there had been no determination by the Department, with full knowledge of the facts, as to the coal character of land, the doctrine of relation can not properly be invoked upon the granting of a prospecting permit under the act of February 25, 1920, to stamp the land as classified, claimed, or reported coal in character for the purpose of defeating an entry initiated after the permit application was filed but before the permit issued..... 343
22. Coal operations upon public lands commenced prior to the award of a lease by one who becomes a successful bidder for a lease at public auction constitute a trespass, notwithstanding that the operations were conducted by a potential lessee..... 501
23. The mining of coal before the filing of an application for a coal lease by one equitably entitled thereto because of prior operations constitutes a trespass, but all coal mined after the filing of the application pursuant to which the lease is awarded will be deemed to have been mined under the terms of the lease..... 501
24. Merely prospecting for coal as preliminary to the opening of a mine does not constitute the commencement of improvements as that term is used in section 2349, Revised Statutes, and the period covered by such preliminary prospecting can not be regarded as falling within the 60-day period during which a coal declaratory statement is required to be filed..... 502
25. Avertisments in a coal declaratory statement to the effect that the declarant had caused an open cut about 8 feet wide to be driven upon a vein of coal that was already exposed by a creek running through the land "thereby opening and improving a vein of good merchantable coal about 7 feet thick," are too general and indefinite to establish the opening and improving of a mine of coal as of the date of the filing of the declaratory statement within the contemplation of the coal land laws..... 502
26. Equitable title to coal lands entered under section 2347 *et seq.*, Revised Statutes, does not vest in the entryman until the laws and regulations shall have been fully complied with, including payment of purchase price, and until that time alienation of the lands is without lawful effect..... 602

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**Coal Trespass.**See *Coal Lands*, 22, 23.

1. Moneys recovered for coal trespasses upon the public lands are covered into the United States Treasury as "Miscellaneous Receipts," irrespective of whether the trespasses occurred before or after the enactment of the leasing act of February 25, 1920, and no exception is made as to recoveries from persons who have been awarded leases under that act..... 501

**Cobalt.**See *Indian Lands*, 10.**Columbia Indian Lands.**See *Indian Lands*, 3.**Colville Lands.**See *Indian Lands*, 11.**Commissioner of the General Land Office.**See *Appeal*, 1; *Practice*, 4; *Supervisory Authority*, 4.

1. Authority to consider and determine the merits and validity of applications for oil and gas prospecting permits, in the first instance, resides in the Commissioner of the General Land Office, and the fact that the local officers, whose functions in this respect are merely ministerial, received without rejecting an application, together with the prescribed bond and fees, does not of itself confer upon the applicant any right to have his application allowed..... 203

**Community Property.**See *Homestead*, 5.**Compactness.**See *Oil and Gas Lands*, 38, 45.**Confirmation.**See *Desert Land*, 5, 6; *Homestead*, 14, 15; *Reclamation*, 4; *Relinquishment*, 2, 3; *Repayment*, 1, 2, 4, 10.**Contest.**See *Appeal*, 1, 2; *Cultivation*, 4; *Fees*, 2; 21, 23, 26; *Notice*, 2, 3; *Oil and Gas Lands*, 46; *Practice*, 3, 4, 6.

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2. Failure to comply with the proof of publication requirement prescribed in Rules of Practice 8 and 10, is not a sufficient ground for the abatement of a contest, where the contestant is seeking to cancel an entry because he is claiming the land under color of title, and the contestee fails to answer allegations which, when undisputed warrant the holding that the tract was not subject to entry..... 1

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3. The Land Department is without jurisdiction to entertain a contest against an entry for which a patent has been duly executed, but not delivered to the patentee because it was prematurely and erroneously issued..... 16
4. The requirement in Rule 8 of Practice that proof of service of notice of contest be made within a specified time, where no answer has been filed, is mandatory, and, upon failure of the contestant to strictly comply therewith, the contest abates *ipso facto*..... 165
5. Submission of testimony at the final hearing before the register and receiver in a contest case, after the taking of testimony before a designated officer, is in the nature of a continuance and is to be governed by the Rules of Practice relating to continuances..... 168
6. One who has purchased improvements placed upon a tract of public land by a homestead entryman, and is occupying and cultivating the land at the time of the initiation of a contest by a third party, should be accorded the privilege of intervening with the view to determining his right to defeat the preference right of the contestant on the ground of equitable estoppel..... 273

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See *Fees*, 2; *Notice*, 3.

**Contiguity.**

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**Coos Bay Wagon Road Grant.**

See *Oregon and California Railroad Lands*, 1.

**Costs.**

See *Practice*, 6.

**Courts.**

See *Homestead*, 1; *Jurisdiction*, 1, 2, 3; *Land Department*, 2, 3; *Mining Claim*, 9; *Notice*, 4; *Public Lands*, 1; *Res Judicata*, 1.

**Cross Lake.**

See *Lake*, 1.

**Crow Lands.**

See *Indian Lands*, 1, 4; *Patent*, 14.

**Cultivation.**

See *Arid Land*, 1; *Preference Right*, 1; *Supervisory Authority*, 6.

1. Instructions of February 1, 1924, reduction of area of cultivation; paragraph 27 (b), Circular No. 541, amended. (Circular No. 912)..... 260
2. The provision in the act of June 6, 1912, pertaining to the granting of relief from the area of cultivation required of homesteaders, does not confer the privilege of demanding as a matter of right that the relief be granted or mandatorily require the granting of such applications in any case or class of cases..... 549

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3. Where, at the time of entry under the enlarged homestead act, the land was subject to entry under both that act and the stock-raising homestead act, and was suitable only for grazing, the entryman is not entitled to equitable consideration in support of an application for reduction of the required area of cultivation..... 549
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1. Instructions of December 29, 1923, rule for fixing the measure of damages in innocent timber trespass cases. (Circular No. 909)..... 223
2. In the settlement of cases against parties who have innocently, but wrongfully, taken timber from public lands in States which have not prescribed rules governing the measure of damages, the stumpage value, or the value of the timber in the standing trees, constitutes the full measure of damages that the Government is entitled to recover..... 211

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**Desert Land.**

See *Assignment*, 1, 2; *Citizenship*, 1; *Entry*, 2; *Military Service*, 1; *Reclamation*, 12; *Relinquishment*, 3; *Repayment*, 2, 6, 9; *Reservation*, 1.

1. Instructions of September 13, 1923, effect of withdrawal of allowable application to make desert-land entry..... 135
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3. Instructions of April 26, 1924, acceptable expenditures on desert-land entries; paragraph 18, Circular No. 474, amended. (Circular No. 933)..... 398
4. Regulations of May 20, 1924, entries and proofs under the desert-land laws; Circular No. 474, revised. (Circular No. 474)..... 443
5. A desert-land entry does not come within the confirmatory provision of section 7 of the act of March 3, 1891, if the final proof shows on its face, at the time of its submission, incomplete and unsatisfactory compliance with law as to appropriation of a water right, and the entryman is required, before the expiration of the two-year statutory period, to remedy the defect or suffer cancellation of the entry..... 336

**Desert Land—Continued.**

6. An application, based upon a canceled desert-land entry for 320 acres, to make an exchange of entry under the act of January 27, 1922, for public land classified as coal land, must be controlled by the act of June 22, 1910, which limits the area of classified coal land that may be acquired under the desert-land laws to 160 acres with reservation of the coal deposits, unless the applicant assumes the burden of proof and shows that the land is non-coal in character.----- 374

7. The desert-land act of March 3, 1877, which fixed the sum of twenty-five cents per acre as the price to be paid upon the initiation of all desert-land entries, did not supersede and destroy the proviso to section 2357, Revised Statutes, which fixed a double price for reserved sections within the limits of a railroad grant.----- 416

8. The act of February 27, 1917, which extended the act of August 30, 1890, by permitting one who has made an enlarged homestead entry for 320 acres, to make a desert-land entry for 160 acres, does not authorize the allowance of any entry under the desert-land law in favor of one who has entered and perfected title to, or is holding an entry or entries of more than 320 acres of agricultural land.--- 560

**Diligence.**

See *Oil and Gas Lands*, 25, 27, 28, 66, 67, 70, 73.

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**Entry.**

See *Appeal*, 2; *Assignment*, 3; *Coal Lands*, 21; *Desert Land*, 6; *Patent*, 2; *Private Entry*, 1; *Records*, 1; *Relinquishment*, 2, 3; *Repayment*, 7, 8, 10.

1. Instructions of December-3, 1924, administrative ruling relating to applications under the act of January 27, 1922, for change of entries. (Circular No. 967)----- 684

2. A change of entry under the act of January 27, 1922, for 160 acres, based upon a canceled desert-land entry for 320 acres, exhausts the right of the entryman to make a further change under the provisions of that act.----- 374

3. The act of January 27, 1922, does not authorize the Secretary of the Interior to permit one to select and transfer payment to 640 acres designated under the stock-raising homestead act in exchange of an entry made under section 2289, Revised Statutes, for 160 acres.----- 635

4. A change of entry under the act of January 27, 1922, may be allowed for two or more incontiguous tracts subject to entry provided that none of the tracts is part of an area approximately equal to that embraced in the canceled entry.----- 636

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**Evidence.**

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1. The fact that an application for an oil and gas prospecting permit was deposited in the post office on a certain day and at a certain hour, does not, when wholly unsupported by other evidence, create a statutory presumption, such as obtains in certain cases involving mere notices to individuals, that the application was delivered in due course.----- 413

**Exchange of Lands.**

See *National Forests*, 1, 2, 3; *National Parks*, 1; *Railroad Grant*, 2.

**Exemption.**

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**Expatriation.**

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**Expenditures, Authorization for.**

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**Farm Units.**

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**Federal Employees.**

1. Instructions of April 12, 1924, prohibition against Federal employees holding interests in Indian oil and gas leases.----- 412

**Federal Power Act.**

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**Fees.**

See *Commissioner of the General Land Office*, 1; *Homestead*, 9, 11, 14, 15; *National Forests*, 2; *Oil and Gas Lands*, 24; *Records*, 4; *Repayment*, 12, 13, 14; *Selection*, 1; *Vested Rights*, 2, 4.

1. Instructions of September 10, 1923, charges for carbon copies of testimony in contest cases; instructions of May 28, 1910 (38 L. D. 615), modified. (Circular No. 904). 133

2. The presentation of an application in due form by a contestant to enter lands embraced within a prior canceled entry in the exercise of his preference right does not have any segregative effect as to the land involved until the required fees have been tendered. 177

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**Fees—Continued.**

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3. As neither the leasing act of February 25, 1920, nor the regulations thereunder specify the procedure to be followed where applicants for prospecting permits tender an insufficient filing fee, the general instructions of August 9, 1918, Circular No. 616, relating to the keeping of records and accounts, are applicable.----- 582

**Final Proof.**

See *Arid Land*, 1; *Cultivation*, 4; *Desert Land*, 5; *Homestead*, 7, 8, 9, 15, 23, 26, 27, 30; *Oil and Gas Lands*, 7, 13; *Patent*, 13; *Vested Rights*, 4.

**Forest Lieu Selection.**

See *Laches*, 1.

1. The selection of land in lieu of a relinquished claim in a forest reserve under the act of June 4, 1897, can be exercised only by or in behalf of the owner of the land relinquished, and any defect of title in the purported owner of the base land is properly subject to objection as against the selector and equally against anyone claiming under the selector, except where title to the selected tract has passed from the Government and is held by a *bona fide* purchaser.----- 504

2. The proviso to the act of March 3, 1906, which provides that if for any reason not the fault of the party making the selection a pending forest lieu selection is held invalid, another selection may be made in lieu thereof, does not authorize a purchaser of the unpatented selected tract, without notice of fraud, to make a new selection, if the base land had been fraudulently acquired and the selection properly rejected.----- 504

**Forfeiture.**

See *Mining Claim*, 7, 8, 13; *Oil and Gas Lands*, 10; *Practice*, 5; *Reclamation*, 7; *Repayment*, 14; *Withdrawal*, 4.

**Fort Apache Lands.**

See *Indian Lands*, 10.

**Fort Assinniboine Lands.**

1. Instructions of February 8, 1924, Fort Assinniboine Abandoned Military Reservation; extension of time for payments; Circular No. 899, amended. (Circular No. 914)----- 276

2. Instructions of July 22, 1924, Fort Assinniboine Abandoned Military Reservation, Montana; extension of time to make payments, act of June 7, 1924. (Circular No. 954)----- 586

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See *Appeal*, 1; *Application*, 1; *Coal Lands*, 7, 16, 17, 21; *Contest*, 1, 2, 6; *Entry*, 3, 4; *Fees*, 2; *Fort Assinniboine Lands*, 2; *Homestead*, 18; *Indian Lands*, 2, 3, 4, 8; *Isolated Tracts*, 1; *Jurisdiction*, 2; *Kinkaid Act*, 1; *Mineral Lands*, 2; *Mining Claim*, 1; *Mortgage*, 1, 2; *Notice*, 1, 3, 6; *Oil and Gas Lands*, 7, 13, 32, 46, 47, 48, 49, 63; *Patent*, 6, 8, 11, 13; *Relinquishment*, 1, 2; *Repayment*, 3, 4, 7, 8, 10; *Settlement*, 1; *Survey*, 3, 7; *Vested Rights*, 4; *Waiver*, 1, 2; *Withdrawal*, 5.

1. Service of notice upon a homestead entryman of the commencement of a suit against him in the local courts by an adverse claimant in no wise calls in question before the Land Department the validity of the entry.----- 5

2. A published report by the Geological Survey that lands are prospectively valuable for oil or gas is sufficient to warrant their withdrawal for such deposits, and one who afterwards enters them under a nonmineral land law must either consent to take a restricted patent in accordance with the provisions of section 3 of the act of July 17, 1914, or assume the burden of proof and show that the lands are in fact nonmineral in character.----- 288

3. A homestead application based upon a claim of settlement initiated subsequent in time to an oil and gas prospecting permit application, can only be allowed subject to the reservations of the act of July 17, 1914, and upon waiver of damages to the surface improvements as required by section 29 of the act of February 25, 1920, and the permit applicant is not obligated to show cause against the allowance of the homestead application upon those conditions.----- 424

4. An entry for land segregated by the prior issuance of an oil and gas prospecting permit can be allowed only for so much of the surface as is not necessary for the operations of the permittee, and the fact that the geologic structure within which the land is situated is producing is a circumstance properly to be considered, but does not change the situation as to the rights of the parties.----- 525

5. An original homestead entry which has become the community property of the entryman and his wife, although the legal title is in the name of the latter, is still owned by the entryman within the intent of section 7 of the enlarged homestead act.----- 563

**Widow; Heirs; Devisee.**

See *Carey Act*, 1.

**Additional.**

See *Homestead*, 23, 28; *Kinkaid Act*, 1.

6. An adjoining farm entry for less than 160 acres is a proper basis for an additional entry under section 2 of the act of April 28, 1904, for an amount of land which added to the area of land embraced in the adjoining farm entry will not exceed 160 acres.----- 614

**Homestead—Continued.****Adjoining Farm.**

See *Cultivation*, 4; *Homestead*, 6.

**Enlarged.**

See *Carey Act*, 1; *Cultivation*, 2, 3; *Desert Land*, 8; *Homestead*, 5, 18, 20; *Mortgagee*, 1; *Supervisory Authority*, 6.

**In National Forests.**

See *Survey*, 7.

**Reclamation.**

See *Repayment*, 5.

7. An alien who has submitted five-year proof upon a reclamation homestead entry which is satisfactory except as to his citizenship qualifications may make a valid assignment of the entry under the act of June 23, 1910..... 4

8. One who purchases a reclamation homestead entry at a mortgage foreclosure sale upon which satisfactory final five-year proof had previously been submitted is entitled to have the foreclosure deed treated as an assignment of the entry under the act of June 23, 1910..... 4

9. The departmental rule that where a desert-land entry upon which final certificate had not issued is acquired by an assignee through mesne transfers, that assignee, if qualified, is entitled to hold the entry, although the intervening assignees were not qualified to take an assignment, is applicable prior to payment of final commissions to reclamation homestead entries upon which final proof of compliance with the ordinary requirements of the homestead law has been submitted and accepted..... 268

10. The limitations imposed on assignments of reclamation homestead entries are limitations, not on the qualifications of the assignee, but on the right of the assignee to receive water..... 268

11. Where land within a reclamation homestead entry is included within a petroleum reserve prior to payment of the final commissions, the entryman must consent to take a restricted patent as provided by the act of July 17, 1914, or apply for a reclassification of the land, and; in the latter alternative, the showing as to its mineral character must be as of the date of the payment of the final commissions..... 268

12. Where a farm unit which has been surveyed without segregation of a railroad right of way contains lands on both sides thereof, disposition of such unit under the reclamation homestead act will be made in accordance with the survey without any deduction from the purchase price as to diminution in area caused by the right of way, but the water charges will be based on the irrigable area only..... 392

13. In the establishment of farm units in a reclamation project upon lands crossed by a railroad right of way, the units are generally confined to one side of the right of way, and no part thereof is included in the survey pursuant to which the lands are disposed of under the reclamation homestead act, but such rule is not invariable and may be modified to meet engineering or irrigation conditions..... 392

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**Homestead—Continued.**

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**Reclamation—Continued.**

14. Receipt for the payment of the final commissions at the date of the submission of proof of compliance with the ordinary provisions of the homestead law in connection with a reclamation homestead entry does not start the running of the confirmatory period in the proviso to section 7 of the act of March 3, 1891..... 506

15. The commencement of the running of the confirmatory period in the proviso to section 7 of the act of March 3, 1891, in connection with a reclamation homestead entry is the date on which receipt issues for payment of the required final commissions, after the entryman has conformed his entry to a farm unit, shown reclamation of one-half of the irrigable area in such unit, assumed payment for a water right, made payment of all accrued water-right charges, and submitted proof of these facts..... 506

**Soldiers.**

16. The provision of section 2309, Revised Statutes, relating to the filing of soldiers' and sailors' homestead declaratory statements by agent was not extended by Congress to include survivors who served in the war with Germany, and consequently is inapplicable to them..... 2

**Soldiers' Additional.**

See *Homestead*, 4; *Oil and Gas Lands*, 62; *Right of Way*, 3; *Vested Rights*, 2.

17. The designation of land as being within the geologic structure of a producing oil field after the filing of an application to make a soldiers' additional entry thereof is not a ground for the rejection of the application..... 524

**Stock-Raising.**

See *Bonds*, 1; *Contest*, 3; *Cultivation*, 1, 3; *Entry*, 3; *Jurisdiction*, 1, 3; *Kinkaid Act*, 1; *Mining Claims*, 2; *Oil and Gas Lands*, 8, 9, 60, 61, 63; *Patent*, 5, 7; *Practice*, 5; *Supervisory Authority*, 6; *Water Right*, 1.

18. Instructions of February 2, 1924, petroleum and naval reserves; stock-raising and other homesteads. (Circular No. 913)..... 261

19. Instructions of July 19, 1924, residence prior to designation on stock-raising homesteads, act of June 6, 1924. (Circular No. 952)..... 580

20. One who files an application under the enlarged homestead act or the stock-raising homestead act for a tract of undesignated land can not be charged with claiming the land therein described until the date the application is allowable after the designation of the land becomes effective..... 3

21. Section 9 of the act of December 29, 1916, reserves to the United States the mineral deposits in lands entered as stock-raising homesteads, and the filing of an application to make entry of lands, subject to entry under that act, confers upon the applicant a prior right to the surface that is not subject to contest by a mineral claimant who bases his right upon discovery made after the filing of the homestead application..... 17

**Homestead—Continued.****Stock-Raising—Continued.**

22. While ordinarily the Department will not inquire whether an applicant under section 4 of the stock-raising homestead act has complied with the law in connection with his original entry, yet an exception will be made in favor of a conflicting applicant who has placed valuable improvements upon the land and made allegations which, if sustained at the hearing, warrant cancellation thereof.----- 136

23. Where an additional entry, made under the stock-raising homestead act of December 29, 1916, is governed by the provisions of section 4 thereof, and acceptable final proof has been submitted on the original entry, the entryman will only be required to show at time of submission of final proof on the additional entry the presence of permanent improvements, tending to increase the value of the land for stock-raising purposes, of the value of not less than \$1.25 per acre.----- 137

24. An entry under the stock-raising homestead act predicated upon a settlement on land within a school section will be allowed where the settlement was made and the designation of the land under that act became effective prior to the completion of the survey in the field and no protest is entered by the State against the allowance of the entry.----- 591

25. The Secretary of the Interior may, in the exercise of his supervisory authority, permit a stock-raising homestead entry to be amended so as to embrace land wholly different from that originally entered, where it is satisfactorily shown that, through no fault of the entryman, the land is so far unfit for occupancy as to render it practically impossible to comply with the law relating thereto. 597

26. Failure to comply with the provision in the third proviso to section 3 of the stock-raising homestead act, specifying that at least one-half of the required improvements shall be placed upon the entry within three years from the making thereof, while a sufficient ground of contest, yet, in and of itself, will not be held such a default that the Department must upon its own initiative cancel the entry. 613

27. Where at the time of submission of final proof upon a stock-raising homestead entry improvements to the extent of \$1.25 per acre had not been placed upon the land, and ample time remained within the statutory life of the entry to make the required improvements, withdrawal of the proof may be allowed and the entry permitted to remain intact, subject to the submission of new proof, at the proper time.----- 613

28. One who has filed a complete application to make a homestead entry which is held suspended pending a segregation survey, is entitled to make an additional stock-raising homestead entry.----- 633

**Homestead—Continued.****Stock-Raising—Continued.**

29. While an agent, transferee, or incumbrancer is not permitted to perform any provision of the homestead law which is required to be the personal act of the entryman himself, yet a transferee or incumbrancer may, in the event that the debtor defaults, submit evidence probative of the fact that the entryman had personally fulfilled the requirements of the statute.----- 645

30. Where a stock-raising homestead entryman, after mortgaging the entry, defaults without submitting final proof, although requested to do so, and the proof offered by the mortgagee is found to be unsatisfactory because of insufficiency of improvements, the latter may, upon a satisfactory showing that the former had met the legal requirements of the statute with respect to improvements, but had stripped the land with the apparent intention of defeating the just claims of the mortgagee, be permitted to restore in value the improvements thus removed and to submit new proof.----- 645

**Improvements.**

See *Bonds*, 1; *Coal Lands*, 5, 6, 8, 14, 24, 25; *Contest*, 6; *Desert Land*, 3; *Homestead*, 3, 22, 23, 26, 27, 29, 30; *Jurisdiction*, 3; *Mining Claim*, 7, 8, 9; *Oil and Gas Lands*, 2, 8, 57, 68, 61; *Phosphate Lands*, 1; *Preference Right*, 1; *Reclamation*, 9; *Supervisory Authority*, 5; *Survey*, 3; *Water Right*, 1.

**Indemnity.**

See *Patent*, 1; *Reclamation*, 10; *Withdrawal*, 7.

1. A State indemnity selection, canceled upon the default of the selector after due notice to answer the charge that the land is mineral in character, will not be reinstated for the purpose of ordering a hearing in the presence of an adverse claim, even though such claim was inadvertently allowed.----- 20

2. Congress in providing in section 29 of the act of June 20, 1910, that indemnity school selections by the State of Arizona should be made subject to the approval of the Secretary of the Interior, who is charged with the duty of determining the character of public lands, intended that such approval should constitute a finding that the lands were of a character which made them subject to selection under the act and be equivalent to a patent, thus depriving the Land Department of further jurisdiction thereover, even though the determination as to the character of the land was erroneous; after such approval the provision of section 2449, Revised Statutes, that the question of mineral character shall remain open, is inapplicable.----- 528

**Indemnity—Continued.**

3. A State may select, subject to the reservations contained in the acts of June 22, 1910, April 30, 1912, and July 17, 1914, lands in designated school sections as indemnity for losses to the grant suffered on account of the mineral character of those sections, and it is immaterial whether the section selected or some other designated section lost to the grant be used as basis for the selection..... 668

**Indian Lands.**

See *Federal Employees*, 1; *Oil and Gas Lands*, 4; *Patent*, 14; *Reclamation*, 1; *Reservation*, 2; *Right of Way*, 4; *Town Site*, 1, 2.

1. Instructions of January 7, 1924, extension of time to purchasers of ceded Crow Indian lands for making payments. (Circular No. 910)..... 258

2. Instructions of June 19, 1924, extension of time for payments on homesteads within the Fort Berthold Indian Reservation, North Dakota. (Circular No. 944)..... 557

3. Instructions of July 1, 1924, disposal of public lands in the Columbia or Moses Reservation, Washington, act of June 3, 1924..... 571

4. Instructions of July 5, 1924, extension of time for payments by purchasers and entrymen of lands within the former Crow Indian Reservation, Montana. (Circular No. 948)..... 573

5. The provisions of the acts of June 30, 1913, and March 3, 1919, which vested the Secretary of the Interior with the authority to dispose of the remaining unappropriated lands in the Kiowa, Comanche, and Apache Indian Reservations in Oklahoma, have no application to any unappropriated lands in the town sites within those reservations that were created pursuant to the act of March 20, 1906... 189

6. The status of the Indians, and other "natives" of Alaska is similar to that of the American Indians within the territorial limits of the United States, and the extent of their interests in the public lands therein is merely that of use and occupancy, subject to such further grant of title as Congress from time to time may see fit to accord..... 315

7. The tide or other lands in Alaska, occupied or reserved for the Indians or natives, can not be disposed of by them under existing law, but the power rests with Congress, with or without their consent, to provide for the ultimate disposal of these lands..... 315

8. Section 27 of the act of June 25, 1910, which provides for the sale of the pine timber on Chippewa Indian lands, does not require the collection of the appraised price of the timber on an entry more than once..... 434

9. The act of June 7, 1897, does not entitle the children born of a marriage solemnized between a white man and an Indian woman to enrollment and to share in the distribution of tribal property, unless their mother had been recognized by the tribe as belonging thereto, and, in this respect, the act did not contemplate a forced recognition without the consent of the tribe..... 551

**Indian Lands—Continued.**

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10. The issuance of a lease conferring the right to mine all the metalliferous mineral deposits in a tract of land on the Fort Apache Indian Reservation, Arizona, pursuant to the act of June 30, 1919, as amended by the act of March 3, 1921, precludes the granting of a lease to another for the mining of any one or more of the minerals specified in those acts so long as the original lease is in effect..... 672

11. While the exemption from taxation for a definite period acquired by an Indian allottee under a trust patent is a vested right of which he can not be deprived without his consent, yet, where he voluntarily applies for and obtains a patent in fee simple under the act of May 8, 1906, he thereby waives his right to the exemption from taxation during the remainder of the original trust period..... 691

**Instructions and Circulars.**

See *Table of*, pages xxii and xxlii.

**Intervention.**

See *Practice*, 7.

**Irrigation.**

See *Arid Land*, 1; *Homestead*, 12, 13, 15; *Payment*, 1; *Reclamation*, 3, 4, 5, 6, 7, 12; *Right of Way*, 1, 2.

**Isolated Tracts.**

See *Indian Lands*, 3.

1. Public land occupied by one under claim of title is not subject to entry by another, and an application to make homestead entry of such tract will not defeat the right of the occupant to acquire title under section 2455, Revised Statutes, which authorizes the sale of isolated tracts, or under any other applicable public land law..... 239

**Jurisdiction.**

See *Contest*, 3; *Indemnity*, 2; *Indian Lands*, 7; *Land Department*, 3; *Mining Claim*, 9; *Notice*, 1, 4, 5; *Oil and Gas Lands*, 1; *Patent*, 2, 5, 6; *Reservation*, 4; *Riparian Rights*, 2, 3, 5; *Secretary of the Interior*, 1; *Survey*, 2.

1. Consideration and adjudication of questions relating to the character of patented lands are solely within the jurisdiction of the courts and, after the issuance of a patent, the Land Department is without authority to try and determine any question of right pertaining thereto..... 16

2. Prior to the issuance of patent, title to public lands under any of the homestead laws remains in the United States to be administered by the Land Department, and until then State courts are without jurisdiction to vest or divest title under any of those laws..... 321

3. The enforcement of the provision in section 9 of the act of December 29, 1916, which obligates one who goes upon lands within a stock-raising homestead entry to prospect for mineral to reimburse the entryman for injury to his permanent improvements, is for the courts and not within the jurisdiction of the Land Department..... 510

**Klowa, etc.; Lands.**

See *Indian Lands*, 5; *Town Site*, 1, 2.

**Kinkaid Act.**

1. The Kinkaid law, act of April 28, 1904, has no relevance to the right to make entry under the stock-raising homestead act of one who has not made an entry under the former act or in the territory affected by that act, or who, having made such entry, has not, under the Kinkaid law, the right to make an additional entry..... 22

**Laches.**

See *Coal Lands*, 18; *Oil and Gas Lands*, 48, 72; *Withdrawal*, 5.

1. The State of Oregon will be deemed to be in laches and the title of the United States to base lands conveyed by a forest lieu selector indefeasible, upon failure to institute further recovery proceedings within a period of nearly five years after court proceedings instituted by the State to recover the land on the ground that it had been fraudulently acquired from it had been dismissed without prejudice because the United States had not been made a party, notwithstanding that there is no statute of limitations barring actions by the State to recover real property..... 420

**Lake.**

See *Mineral Lands*, 3; *Oil and Gas Lands*, 1; *Patent*, 10; *Riparian Rights*, 1-5; *Survey*, 2, 6.

1. The area occupied by Cross Lake, Louisiana, being potentially navigable, although not actually used as a highway of commerce at the time that the State was admitted to the Union, is to be held as navigable on that date, and the title to all of the lands below the mean high-water mark passed to the State upon its admission by virtue of its sovereignty..... 180

**Land Department.**

See *Contest*, 3; *Homestead*, 1; *Indemnity*, 2; *Jurisdiction*, 1, 2, 3; *Mining Claim*, 9; *Notice*, 1, 5; *Officers*, 1; *Oil and Gas Lands*, 15; *Patent*, 2, 3, 5, 12; *Practice*, 5, 7; *Reservation*, 4; *Res Judicata*, 1; *Riparian Rights*, 5; *School Land*, 3; *Secretary of the Interior*, 1; *Supervisory Authority*, 5; *Survey*, 2; *Withdrawal*, 2, 5.

1. In the exercise of its broad powers to do justice the Land Department should so far as within it lies put an end to controversies involving title to public lands which have been once finally adjudicated by it..... 10

2. The rules of law as applied by the courts are binding upon the Land Department only in so far as they are not adverse to but assist its functions as an administrative agency of the executive branch of the Government which, as the proprietor of the public domain, is a party to all proceedings relative to the disposal of the public lands, and entitled to rely upon and adhere to their classification, once arrived at, even though between others than the parties to a new application to enter..... 23

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3. It is exclusively within the province of the courts to declare an act of Congress unconstitutional, and, until an act dealing with the public lands is finally determined by the courts to be unconstitutional, it is the duty of the Land Department to administer it as Congress directs..... 521

**Lease.**

See *Coal Lands*; *Oil and Gas Lands*; *Phosphate Lands*; *Potash Lands*; *Saline Land*; *Bonds*, 1; *Coal Lands*, 1, 2, 3, 4, 6, 7, 8, 10, 11, 12, 13, 22, 23; *Coal Trespass*, 1; *Federal Employees*, 1; *Indian Lands*, 10; *Oil and Gas Lands*, 4, 5, 63; *Patent*, 9, 13; *Phosphate Lands*, 1, 2, 3; *Potash Lands*, 1, 4; *Reclamation*, 11; *Records*, 1.

**Lieu Selection.**

See *Power Sites*, 1.

**Lighthouse Reservation.**

See *Reservation*, 4.

**Louisiana.**

See *Lake*, 1; *Riparian Rights*, 1.

**Marriage.**

See *Citizenship*, 1, 2; *Indian Lands*, 9; *Officers*, 4.

**Menominee Lands.**

See *Indian Lands*, 9.

**Military Bounty Land Warrant.**

See *Warrant*.

**Military Reservation.**

See *Fort Assiniboine Lands*, 1, 2.

**Military Service.**

See *Homestead*, 16; *Mining Claim*, 8.

1. Instructions of November 21, 1924, proofs by incapacitated soldiers upon claims initiated under the desert-land laws, act of December 15, 1921. (Circular No. 805, revised.)..... 674

2. Military service is not recognized by the act of February 25, 1920, as a ground for the award of a preference right to an oil and gas prospecting permit..... 413

**Mineral Lands.**

See *Coal Lands*; *Oil and Gas Lands*; *Phosphate Lands*; *Potash Lands*; *Saline Land*; *Homestead*, 2, 21; *Indemnity*, 1, 2, 3; *Indian Lands*, 10; *Land Department*, 2; *Mining Claim*, 1, 2, 16; *Oil and Gas Lands*, 13, 26, 32, 65; *Patent*, 7, 12; *Phosphate Lands*, 4; *Reclamation*, 11; *Repayment*, 16; *Reservation*, 1; *Riparian Rights*, 3, 5; *Selection*, 2; *Settlement*, 1; *Vested Rights*, 2; *Withdrawal*, 8.

1. Instructions of June 18, 1924, amending paragraph 89 of the mining regulations, Circular No. 430, pertaining to the form of notice to be published with applications for mineral patents. (Circular No. 943)..... 556

**Mineral Lands—Continued.**

2. A departmental regulation declaring that a report by the Geological Survey that land covered by an unperfected nonmineral entry without a reservation of the oil and gas content has a prospective value for oil and gas, impresses the land with a *prima facie* mineral character sufficient to require the entryman to consent to a reservation of the minerals or to assume the burden of proof and show that the land is in fact nonmineral, carries out the intent of Congress as expressed in the act of July 17, 1914, and is valid. . . . . 277
3. The rule that the known mineral character of public lands which have not been reported, withdrawn, or classified as mineral, must be determined as of the time when the claimant has completely fulfilled the requirements of the law under which he claims, in order that mineral deposits may be reserved to the United States, is as applicable to lands in lake beds which the Government knows will pass to the riparian proprietor as appurtenant to the upland, as it is to the upland itself. . . . . 285
4. In the second proviso to section 21, and in section 37 of the act of February 25, 1920, Congress expressly recognized oil shale to be a mineral deposit that was subject to location and patent under the mining laws. . . . . 323
5. Lands that were known to be chiefly valuable for their deposits of oil shale at and prior to the acceptance of the Government survey thereof, were known mineral lands at that time and were, therefore, excepted from the grant to the State of Utah for school purposes. . . . . 323
6. Only where the United States has indicated that mineral lands are held for disposal under the land laws does section 2319, Revised Statutes, apply, and it is never applicable where the United States directs that the disposal be only under other laws. . . . . 687

**Mining Claim.**

- See *Homestead*, 21; *Mineral Lands*, 1; *Notice*, 8; *Oil and Gas Lands*, 16, 26, 39, 65, 66, 67; *Patent*, 9; *Phosphate Lands*, 4; *Repayment*, 12, 13, 16; *Reservation*, 1; *Withdrawal*, 4, 8.
1. A location certificate does not of itself constitute evidence of the mineral character of the land described therein, nor do the recitals in a location notice or certificate that a discovery has been made constitute evidence of discovery. . . . . 6
2. Section 9 of the act of December 29, 1916, contemplated the perfection of claims by locators under the placer mining laws to the reserved mineral deposits, and possession of the land by a stock-raising homestead entryman with the acquiescence of a placer mining claimant does not constitute an adverse possession that will estop the latter from denying abandonment of the mining claim. . . . . 192
3. The provision in section 2320, Revised Statutes, that with respect to lode mining claims no location shall be made until there shall have been a discovery of the vein or lode within the limits of the claim located, was made applicable to placer mining claims by section 2329, Revised Statutes. . . . . 244

**Mining Claim—Continued.**

4. A meager showing of oil in a well drilled on a location to a stratum of sand wholly separate and distinct from the underlying formations in which workable oil deposits are expected to be developed within the limits of the claim and in the vicinity thereof does not constitute a valid discovery, and affords no legal basis for entry and patent under the placer mining laws. . . . . 244
5. To support a mining location, the discovery upon which the validity of the location is based must be of the particular deposit actually discovered within the limits of the claim for the reasonable prospect of the development of which into a valuable mine the evidence warrants further expenditure of time and money. . . . . 253
6. The fact that developments outside of a mining location, or that geological deductions indicate the existence within the limits of the claim, but unexposed therein, of deposits wholly unconnected with the deposit actually exposed or discovered, sufficient to warrant expenditures in the development of the claim, does not constitute a valid discovery of mineral upon which to predicate a right to a patent. . . . . 253
7. The provision in section 2324, Revised Statutes, declaring that a mining claim upon which the required annual assessment work has not been performed shall be subject to relocation in the same manner as if no location of the same had ever been made, impresses the land in a defaulted claim with the status of public land which, as long as it remains in that state, may be withdrawn by the Government. . . . . 262
8. The joint resolution of July 17, 1919, which, under certain specified conditions, exempted owners of mining claims who entered the military or naval service of the United States during the war with Germany, from the forfeiture penalty imposed for nonperformance of annual assessment work by section 2324, Revised Statutes, did not contemplate extension of its application substantially beyond the date of the establishment of a status of peace. . . . . 291
9. Disputes between rival claimants relating to the fulfillment by mining locators, or their successors in interest, of the legal requirements as to performance of annual assessment work, or relating to the filing of notices in compliance with a relief statute with a view to holding claims without the performance of such work, are not, generally, matters for departmental determination, but come exclusively within the jurisdiction of the courts. . . . . 291
10. Right of possession to a claim under the mining laws prior to discovery is accorded only so long as the claimant remains in actual physical possession of the land and in diligent prosecution of prospecting operations, and where there has been no discovery, the mere performance of so-called assessment work will not prevent relocation by another. . . . . 348

**Mining Claim—Continued.**

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11. Trap, or trap rock, a general name for dark fine-grained rock, found in broken-up fragments in a limited area, which is particularly suitable and can be profitably marketed for ballast, is, when the land in which it is contained is chiefly valuable for such, a valuable mineral deposit subject to appropriation and patent under the placer-mining laws..... 489

12. The use of water in a shaft for the grazing of cattle by the locator upon lands within his mining location is merely incidental to the primary purpose of the claim and does not affect the locator's right to a patent in the absence of abandonment or forfeiture of the claim where a discovery of mineral and the expenditures prescribed by the mining laws as prerequisite to patent had been made..... 528

13. Failure to record the location notice of a mining claim does not render the location invalid or work a forfeiture of the claim in the absence of intervening adverse rights under the mining laws, where the local customs or statutes do not so provide..... 577

14. Where a variance or discrepancy between a mineral location notice or certificate and the stakes and monuments on the ground exists, the latter are more certain evidence of the exact situs of the claim and will prevail.... 577

15. To determine the necessity of a segregation survey, it should be established with certainty by competent testimony that a mining claim includes or invades a subdivision and that the valuable mineral lands are within the boundaries of the claim..... 577

16. The proviso to section 24 of the Federal Water Power Act, considered in the light of the provisions of section 2 of the act of June 9, 1916, operates retroactively to validate mining claims, otherwise regular, located upon lands within the forfeited grant to the Oregon and California Railroad Company, after their Executive withdrawal as "power site lands," but prior to their classification as such, the claims, however, being subject to the conditions and limitations of said section 24..... 656

**Minnesota.**

See *Reclamation*, 2.

**Mission Claim.**

See *Patent*, 14.

**Montana.**

See *Fort Assinniboine Lands*, 1, 2; *Indian Lands*, 1, 4; *Patent*, 10; *Riparian Rights*, 4, 5.

**Mortgage.**

See *Homestead*, 8, 29, 30.

1. Where an entry is relinquished after the equitable title thereto has been earned and the county records show at date of relinquishment the existence of a mortgage, a trust will be declared against a subsequent entry for the benefit of the mortgagee to the extent of the mortgage..... 431

**Mortgage—Continued.**

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2. The purchase of a relinquishment of an entry, the equitable title to which had been earned, for a mere fraction of its value, without consulting the records of the local office and the county records, gives rise to the suggestion of bad faith on the part of the purchaser and precludes the plea by him of ignorance of the existence of a mortgage, where those records contain sufficient data to put him on notice thereof..... 431

**Mortgagee.**

See *Homestead*, 8, 29, 30.

1. Consent to accept a restricted patent in accordance with the provisions of the act of July 17, 1914, for oil and gas lands, may be filed by a mortgagee, if the homestead entryman, after proper notification, fails to do so... 240

**Moses Indian Lands.**

See *Indian Lands*, 3.

**National Forests.**

See *Power Site*, 1; *Statutes*, 11.

1. Instructions of February 1, 1924, consolidation of national forests; description of lands to be exchanged; Circular No. 863, amended. (Circular No. 918)..... 261

2. Instructions of February 4, 1924, consolidation of national forests; fees for exchange of lands and timber; Circulars Nos. 863 and 869, amended. (Circular No. 919)..... 268

3. The act of September 22, 1922, which provides for an exchange of national forest lands, does not contemplate a forced exchange, but authorizes the execution of a quitclaim deed where the former owner of the base land, after relinquishing it, declines to make the exchange..... 435

**National Monuments.**

See *Right of Way*, 2, 4.

**National Parks.**

See *Right of Way*, 2, 4.

1. Instructions of November 10, 1924, exchange of public lands in Utah for privately owned lands in the Utah and Zion National Parks, act of June 7, 1924. (Circular No. 964)..... 662

**Naturalization.**

See *Citizenship*, 1, 2.

**Naval Reserve.**

See *Homestead*, 18.

**Naval Service.**

See *Military Service*.

**Navigable Waters.**

See *Lake*, 1; *Riparian Rights*, 1; *Words and Phrases*, 7.

1. Upon the admission of a State into the Union the title to all lands under the navigable waters within the State inures to the State as an incident of sovereignty, and the laws of the State govern with respect to the extent of the riparian rights of the shore owners..... 679

**Nevada.**

See *Arid Land*, 1.

**New Mexico.**

See *Reclamation*, 10; *School Land*, 2, 3.

**North Dakota.**

See *Indian Lands*, 2.

**Notary Public.**

See *Attorney*, 1.

**Notice.**

See *Appeal*, 2; *Coal Lands*, 14, 15, 16; *Contest*, 2, 4; *Evidence*, 1; *Homestead*, 1; *Indemnity*, 1; *Mineral Lands*, 1; *Mining Claim*, 1, 9, 13, 14; *Mortgage*, 2; *National Parks*, 1; *Oil and Gas Lands*, 39, 40, 44, 48, 49; *Private Entry*, 1; *Reclamation*, 6; *Relinquishment*, 4; *Repayment*, 5; *Supervisory Authority*, 2; *Timber and Stone*, 4.

1. While Rule 95, Rules of Practice, provides that notice of appeal must be served on an adverse party either personally or by registered mail, yet failure to receive such notice does not deprive the department of its jurisdiction to act upon the appeal.----- 5

2. Under the Rules of Practice notice of contest must be served upon the entryman and service of notice upon his agent or attorney is insufficient.----- 165

3. Failure to serve notice of the cancellation of an entry under contest upon the attorney designated by the contestant in his application to contest does not relieve the contestant from fulfillment of the law with respect to the exercise of his preference right if he himself had been duly notified thereof.----- 177

4. The rules relating to notices *lis pendens* that are applicable to the courts have no application to proceedings before an executive department, and recordation in the office of the recorder of the county in which the lands are situated of proceedings in a local land office, there being no statutory requirement to that effect, neither constitutes constructive notice nor raises a presumption of notice.----- 199

5. Where there is no law making it the duty of a county recorder to receive and record notices of proceedings in a local United States land office, the Land Department is powerless to enforce any order or regulation it might issue directing the recordation of such notices.----- 199

6. A notice by a party not of record as a *bona fide* applicant for an oil and gas prospecting permit, reciting a mere intent to make application in the future, is not such a notice as is contemplated by section 12 (a) of the leasing regulations, or which puts the surface entryman under any duty to exercise his preference right.----- 409

7. The posting of a notice of intention to make application for an oil and gas prospecting permit upon land embraced within a surface entry, as provided in section 13 of the leasing act, merely preserves for a limited period a preference right to a permit as against other applicants under that section, but rights of claimants under other sections of the act are unaffected thereby.----- 409

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**Notice—Continued.**

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8. A published notice that an application for a mineral patent "is about to be filed" does not meet the requirement of section 2325, Revised Statutes, that a notice that an application for such patent "has been filed" shall be published, and consequently does not afford a basis for mineral patent.----- 661

**Oaths.**

See *Attorney*, 1.

**Occupancy.**

See *Coal Lands*, 6; *Contest*, 6; *Homestead*, 25; *Indian Lands*, 6, 7; *Isolated Tracts*, 1; *Mining Claim*, 2; *Supervisory Authority*, 5.

**Officers.**

See *Attorney*, 1; *Commissioner of the General Land Office*, 1; *Contest*, 5; *Federal Employees*, 1; *Practice*, 3; *Repayment*, 13; *Secretary of the Interior*, 1, 2; *Supervisory Authority*, 1.

1. Section 452, Revised Statutes, which prohibits officers, clerks and employees in the General Land Office from directly or indirectly purchasing or becoming interested in the purchase of any of the public lands, is not to be construed as including officers, clerks and employees of the Bureau of Reclamation.----- 175

2. Violation by a project manager of the departmental order of April 11, 1912, prohibiting superintendents of irrigation, engineers, or other officers or employees in responsible charge of a reclamation project, from acquiring any interest in property within that project, subjects him to disciplinary action, although the transaction may not be illegal.----- 175

3. A Territorial legislature does not possess the power to impose in any manner duties on a Federal officer, and, if such be attempted, he can not properly perform them unless they come within the scope of his duties as fixed by the Federal statutes.----- 365

4. Official papers in land matters executed before a United States Commissioner in her maiden name and under which she was commissioned should be accepted, in the absence of other objection, notwithstanding her marriage while holding such appointment.----- 649

**Oil and Gas Lands.**

**Leasing Act of February 25, 1920.—Generally.**

See *Alaska*, 2; *Bonds*, 1; *Coal Lands*, 9; *Commissioner of the General Land Office*, 1; *Evidence*, 1; *Federal Employees*, 1; *Fees*, 3; *Homestead*, 2, 4, 11, 17, 18; *Jurisdiction*, 3; *Lake*, 1; *Military Service*, 2; *Mineral Lands*, 2, 4, 5; *Mining Claim*, 2-5, 7, 10; *Mortgagee*, 1; *Notice*, 6; *Patent*, 6-9, 11-13; *Phosphate Lands*, 4; *Practice*, 6, 7; *Reclamation*, 8, 9, 10; *Relinquishment*, 4; *Repayment*, 5, 12; *Reservation*, 1; *Right of Way*, 3; *School Land*, 4-7; *Settlement*, 1; *Survey*, 4, 5; *Vested Rights*, 4; *Waiver*, 1, 2; *Withdrawal*, 2-5.

**Oil and Gas Lands—Contd.****Leasing Act of February 25, 1920.—Generally—Continued.**

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1. Where the title to lands abutting upon a nonnavigable lake remains in the United States, the Government, as a riparian proprietor, may grant permits and leases pursuant to the act of February 25, 1920, of the lake bed separate and apart from the uplands, but patents for the uplands must contain appropriate reservations..... 281

2. Public lands withdrawn for a reservoir site, or other similar purpose, which contain deposits of oil or gas, may be restored and leased pursuant to the act of February 25, 1920, where their restoration can be effected without damage to the project, or unless, because of improvements placed thereon, the lands have become subject to disposition only by sale for the benefit of the reclamation fund. 308

3. One well drilled in an advantageous position upon a geologic structure covering a large area is usually a sufficient test, if successful, to warrant the definition of the entire structure as producing and subject to lease..... 546

**Compactness.**

See 38, 45, *infra*.

**Contiguity.**

See 38, 43, 44, 45, *infra*.

**Contribution to Cost of Test Well.**

See 3, *supra*; 23, 27, 28, 66, 74, *infra*.

**Damage to Improvements of Surface Entryman.**

See 8, 57, 58, 60, 61, *infra*.

**Definition of Structure.**

See 3, *supra*; 12, 13, 30, 31, 34, 42, 72, *infra*.

**Discovery.**

See 10, 30, 37, 41, 42, 45, 66, 67, 72, *infra*.

**Group Development.**

See 16, 27, 28, 66, 67, 70, *infra*.

**Indian Lands.**

See 4, *infra*.

**Past Production.**

See *Words and Phrases*, 3.

**Prospective Value.**

See 7, *infra*.

**Relinquishment.**

See 23, *infra*.

**Restorations.**

See 10, 12, 23, *infra*.

**Royalty.**

See 30, 45, *infra*.

**Segregative Effect.**

See 1, 2, *supra*; 12, 14, 19, 23, 26, 34, 36, *infra*.

**Oil and Gas Lands—Contd.**

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**Test Well.**

See 3, *supra*; 23, 27, 28, 66, 74, *infra*.

**Prospecting Permits.**

See 1, 3, *supra*; 45, 54, 56-64, 68-74, *infra*; *Alaska*, 2; *Appeal*, 2; *Bonds*, 1; *Coal Lands*, 1, 2, 3, 7, 11, 12, 13, 18, 19, 20, 21; *Commissioner of the General Land Office*, 1; *Evidence*, 1; *Fees*, 3; *Homestead*, 3, 4; *Jurisdiction*, 3; *Military Service*, 2; *Notice*, 6; *Phosphate Lands*, 2, 3; *Potash Lands*, 3, 4; *Practice*, 6, 7; *Reclamation*, 8, 10; *Records*, 1-4; *Relinquishment*, 4; *Reservation*, 1; *Right of way*, 3; *Survey*, 4, 5; *Waiver*, 1, 2; *Withdrawal*, 3.

4. Instructions of January 14, 1924, oil and gas prospecting permits and leases embracing lands within Executive order Indian reservations; additional requirements..... 238

5. Instructions of April 5, 1924, expiration of prospecting permits, acts of October 2, 1917, and February 25, 1920. (Circular No. 926)..... 364

6. Instructions of April 28, 1924, rights of settlers to oil and gas deposits, act of February 25, 1920. (Circular No. 932)..... 400

7. An application for an oil and gas prospecting permit embracing lands within a homestead entry, filed by the entryman during pendency of action by the Land Department upon the question of allowance of his final proof, constitutes an admission that the land had a prospective oil and gas value and amounts to an election to take a restricted patent in accordance with the provisions of the act of July 17, 1914..... 185

8. A permittee under an oil and gas prospecting permit is not authorized to injure the permanent improvements of a stock-raising homestead entryman, and damages to crops must be compensated for as provided by section 9 of the act of December 29, 1916... 192

9. A stock-raising homestead entryman does not have a sufficient interest in the reserved mineral deposits in the lands within his entry to entitle him to protest against the issuance of an oil and gas prospecting permit, except it be in his capacity as a citizen desiring to prevent the perpetration of a fraud upon the Government..... 192

10. The language contained in paragraph 9 of the oil and gas regulations of March 11, 1920, declaring that in the absence of discovery of oil or gas within the period of a prospecting permit or extension thereof, the permit will thereupon terminate and the lands automatically revert to their original status, does not authorize another to file an application to prospect for the same deposits in the lands prior to the cancellation of the permit by the Commissioner of the General Land Office and notation thereof upon the records of the local land office..... 201

11. The act of February 25, 1920, does not contain any provision whereunder a settler upon public lands within a particular State may be awarded a permit to prospect for oil and gas therein in preference to a resident of another State..... 208

## Oil and Gas Lands—Contd.

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## Prospecting Permits—Continued.

12. Where an application for a prospecting permit is denied because of the inclusion of the lands within a producing oil and gas field, such application can not be revived by re-statement upon a subsequent restoration of the lands, but they will be open to prospecting after their restoration as though no application had been filed. . . . . 213

13. Where a report by the Geological Survey, which shows that land within an unperfected nonmineral entry is prospectively valuable for its oil and gas contents, is lacking in the definiteness contemplated by the regulations issued pursuant to the leasing act, and is followed by a more specific report based upon the same facts, the first report is sufficient to put the nonmineral character of the land in issue, and submission of final proof prior to the supplemental report will not shift the burden of proof upon the Government. . . . . 277

14. Neither the leasing act of February 25, 1920, nor the regulations issued thereunder, give exclusive segregative effect to an application for a prospecting permit and, until the Department has satisfied itself as to the qualifications of the first applicant and issued a permit to him, applications may be filed by others and, if the first application be rejected, their claims will be considered in the order initiated until one is found qualified to receive a permit. . . . . 339

15. The Land Department deals only with the real parties in interest with reference to the issuance of oil and gas prospecting permits, and equities entitling one to a permit must be asserted and exercised by the party who is predicated a preference right thereupon. . . . . 339

16. The principle of group development, recognized by the Department in connection with the granting of extensions of time for the performance of the conditions in prospecting permits issued pursuant to the leasing act, has no application to like development of more than 160 acres under the placer mining laws by one not in possession, or entitled against others to possession of the lands claimed. . . . . 349

17. Nothing in the act of February 25, 1920, either directs or suggests that an applicant for an oil and gas prospecting permit shall be entitled in every instance to be awarded a permit for the maximum area authorized by the act. . . . . 353

18. Where a permit has been applied for or issued under the leasing act, and the land has not been withdrawn or classified as valuable for oil or gas deposits, a conflict between the permittee and a nonmineral entryman who settled upon the land prior to the initiation of the permit will be adjudicated pursuant to section 12(c) of the oil and gas regulations, and the entryman will be afforded an opportunity to prove that the lands are nonmineral in character. . . . . 370

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## Prospecting Permits—Continued.

19. The provision in section 4 of the oil and gas regulations of March 11, 1920, relating to the thirty-day suspension in local offices of permit applications to await the presentation of preference right claims before transmittal to the General Land Office, applies only to applications for lands subject to disposal under the leasing act, but an application for prospecting land covered by an unanceled permit, or otherwise segregated, should be rejected at once by the local officers, subject to the right of appeal, and transmitted in due course to the Commissioner of the General Land Office. . . . . 395

20. While the Department will refuse to approve the assignment of a mere application for an oil and gas prospecting permit, yet it may recognize, in connection with such application, persons who desire to become associated with the permittee in development of the land, and, in such event, will issue a permit to the applicant and his associates, if they be qualified. . . . . 493

21. The assignment of an oil and gas prospecting permit does not create separate and distinct obligations to the United States, but the assignee merely secures as to the land assigned the same right to prospect thereon which the permittee had, and drilling by either the permittee or the assignee is development for the entire permit. . . . . 510

22. No such right is acquired by the filing of an oil and gas prospecting permit application under the act of February 25, 1920, as will prevent its allowance from being controlled by circumstances arising after its presentation or its rejection under later statutes. . . . . 534

23. Where permits are canceled upon relinquishments or because of defaults of permittees, the lands covered thereby will not be restored to further disposal under the leasing act if test wells have been or are about to be drilled upon the geologic structure which includes those lands, pending the completion of the wells. . . . . 546

24. An application for an oil and gas prospecting permit under the act of February 25, 1920, does not have an exclusive, segregative effect, and failure on the part of the applicant to pay the requisite filing fees until long after the time allowed by the regulations, is, in the absence of a showing of proper cause for the delay, a ground for the rejection of the application where an adverse application had been filed prior to the payment of the full filing fees. . . . . 551

25. So long as an oil and gas permit stands in the name of a permittee, he alone is responsible to the Department for compliance with its drilling requirements, and if his operating agent, or his drilling contractor, is not complying with the terms of the permit, the duty devolves upon the permittee to enforce such compliance, and his diligence will be tested by his efforts in that direction. . . . . 610

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## Section 13.—Permits—Continued.

40. The provision in section 13 of the act of February 25, 1920, which gives a preference right to an oil and gas prospecting permit for six months following the marking and posting of notice upon lands in Alaska, is to be construed to mean for six calendar months thereafter, and that the time shall expire at the close of an official day of the local office in the sixth month following posting which corresponds to the date of posting, unless such day does not occur in the sixth month, in which event the last day of that month will mark the expiration of the preference right period. 493

41. Section 13 of the act of February 25, 1920, is to be construed in connection with sections 14 and 17 of that act, and, when so construed, it is clear that the issuance of permits thereunder is contemplated only to encourage such prospecting as will bring into production a new field or to extend the known limits of a field already producing. 546

42. Lands not covered by permit within the geologic structure of a newly proved oil and gas field, are not subject to prospecting under section 13 of the act of February 25, 1920, but should be offered for lease under section 17 of that act. 546

43. Noncontiguous areas of oil and gas lands, to be subject to a single permit under section 13 of the act of February 25, 1920, must be such as may be included in an area six miles square. 665

44. Where a single application for an oil and gas prospecting permit is for incontiguous tracts, the erection of a notice upon each tract with a description of the land is required to fulfill the provision of section 13 of the act of February 25, 1920, if the lands be surveyed, but, if unsurveyed the corners of each tract must be monumented. 690

## Notice.

See 39, 40, 44, *supra*.

## Section 14.—Permits and Leases.

See 4, 27, 30, 31, 37, *supra*; 55-60, 63, 54, *infra*; Survey, 4; Withdrawal, 3.

45. The term "shall be in compact form," as used in section 14 of the act of February 25, 1920, in connection with the granting of a five per cent royalty lease thereunder, does not require that the leased lands be contiguous in all cases, but contemplates that a permittee may, where incontiguous tracts have been included in a prospecting permit, select as a reward for discovery, the legal subdivision upon which the discovery well is located, and such remaining land, as near thereto as is possible, up to the prescribed amount, whether contiguous or noncontiguous. 562

## Section 17.—Lease.

See 4, 12, *supra*; 55, 56, 57, 59, 60, 63, 64, *infra*; Reclamation, 8.

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## Sections 18, 19, and 20.—Preference Right to Permits and Leases.

See 11, 15, 16, 32, 34, 36, 39, 40, *supra*; 52-54, *infra*; Repayment, 12.

46. The preferment in the award of an oil and gas prospecting permit accorded to a homestead entryman by section 20 of the act of February 25, 1920, over a prior applicant for a permit under section 13 of that act, is not affected by a pending contest against the entry where there is no charge that the entry was made with a view to acquiring the mineral deposits or in bad faith for any other purpose. 134

47. A settlement claim made under the homestead laws prior to the inclusion of the land within a petroleum withdrawal, which did not ripen into an entry until after the creation of the withdrawal, affords the entryman no basis for a preference right to an oil and gas prospecting permit under section 20 of the act of February 25, 1920. 208

48. Nonaction on the part of one to whom is accorded a preference right to an oil and gas prospecting permit by section 20 of the act of February 25, 1920, after service of notice upon him by a permit applicant in accordance with a departmental regulation issued pursuant to that act, creates a constructive waiver of the preference right which estops him from ever thereafter asserting the right, notwithstanding that the application in connection with which the notice was served is disallowed. 406

49. A regulation which requires that a surface entryman exercise a preference right to a prospecting permit under section 20 of the leasing act, upon service of notice by one having an adverse application pending, or to show that the adverse claimant is disqualified to hold a permit, is a regulation necessary and proper to achieve the purposes of the act, and is authorized by section 32 thereof. 409

50. Section 18 of the leasing act was only intended to afford relief to a class of claimants whose claims were initiated under pre-existing laws, such relief to be personal, not to enlarge the rights of persons who had spent nothing until after the leasing act had been enacted and the original claimants had been awarded the leases. 620

## Notice.

See 48, 49, *supra*.

## Section 21.—Oil shale.

See Notice, 4, 5.

## Section 22.—Alaska.

See 40, *supra*; Alaska, 2.

## Section 23.—Sodium Permits.

See 1, *supra*; 63, *infra*; Riparian Rights, 5.

## Section 24.—Sodium Lease.

See 1, *supra*; 63, *infra*; Potash Lands, 2.

## Section 26.—Diligence.

See 25, 27, 28, *supra*; 66, 67, 70, 73, *infra*.

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**Section 27.—Restrictions.** Page

See 16, 17, 30, 31, 38, 43, *supra*; *Coal Lands*, 4, 10.

51. Section 27 of the leasing act was designed to prevent monopolies of geologic structures and excessive holdings within any one State by any person, association, or corporation..... 620

52. The provision in section 27 of the leasing act that nothing therein should be construed to limit section 18 thereof contemplated that the limitation in said section 27 as to the number of leases that might be acquired directly to three leases in a State should not prevent a qualified claimant under section 18 from acquiring a larger number of leases so long as such number does not exceed in the aggregate an area of 3,200 acres..... 620

53. The proviso to section 27 of the leasing act has reference solely to limitations upon qualified claimants under section 18 of that act and not to their assignees..... 620

54. The restrictions of section 27 of the act of February 25, 1920, as to the number of leases or permits that may be held by one person upon a geological structure and to the limit of acreage that may be acquired in leases and permits, while not applicable to persons entitled to relief under section 19 of that act, nevertheless apply to transferees or assignees of prospecting permits or leases issued under the latter section..... 639

55. Section 27 of the act of February 25, 1920, does not contain any express limitation preventing a corporation, if authorized by its charter, from becoming interested, as a member of an association, in more than one lease on a geologic structure or more than three leases in a State, provided that the interests, both direct and indirect, do not exceed 2,560 and 7,680 acres, respectively..... 652

**Section 29.—Easements.**

56. The only disposition that may be made of the surface pursuant to section 29 of the act of February 25, 1920, of lands for which a prospecting permit or lease has been awarded, is such disposal, under existing nonmineral land laws, as will preserve to the permittee or lessee free use of the surface in any manner necessary to meet the fullest compliance with the terms of the permit or lease..... 369

57. The free use of the surface accorded by section 29 of the act of February 25, 1920, to a permittee or lessee, is included in the right to prospect for, mine and remove the mineral deposits reserved by the act of July 17, 1914, in lands subsequently entered pursuant to the latter act, and the waiver of compensation required of such entryman is not an alteration or enlargement of the terms of the act of 1914, inasmuch as the only provision in that act requiring reimbursement to an entryman for damage to his crops and improvements, is that contained in section 2 thereof, which relates to nonmineral claims antedating the initiation of mineral rights.... 369

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**Section 29.—Easements—Continued.** Page

58. The practice of requiring an express waiver of claim to compensation for damage to crops and improvements by one who has been permitted to make a surface entry pursuant to section 29 of the act of February 25, 1920, is merely an administrative means of fully informing the entryman as to the extent of his rights under that section..... 369

59. The authority conferred upon the Secretary of the Interior by section 29 of the act of February 25, 1920, to permit the allowance of surface entries of lands included in prospecting permits and leases is discretionary with that officer..... 383

60. Section 29 of the act of February 25, 1920, provides that only such surface as is not necessary for the use of a permittee or lessee may be disposed of, and, where a stock-raising homestead entry has been allowed pursuant to that section, the right vested in the permittee or lessee to use so much of the surface as may be necessary to conduct operations under the permit or lease is paramount to the right of the entryman to use such surface.... 383

61. Section 29 of the act of February 25, 1920, modifies that portion of section 9 of the stock-raising homestead act which requires compensation for damage to the crops and improvements of the entryman resultant from the prospecting for the reserved mineral deposits; as to stock-raising homestead entries allowed pursuant to the former section..... 383

62. Where an oil and gas prospecting permit has been issued prior to the initiation of a claim under the nonmineral land laws, an entry may be allowed only as to the surface, and subject to the prior right of the permittee to the use thereof as prescribed in section 29 of the leasing act, and the permittee should be afforded an opportunity to show cause why a surface entry should not be allowed..... 524

63. The rights reserved by section 29 of the act of February 25, 1920, in lands under permit or lease are limited to disposals of the surface; that is, to nonmineral entries authorized by the acts of July 17, 1914, and December 29, 1916..... 640

**Section 30.—Assignment of Lease.**

See 30, 31, *supra*.

**Section 32.—Regulations.**

See 49, *supra*.

64. Included in the general power conferred upon the Secretary of the Interior by section 32 of the act of February 25, 1920, to make regulations and to do all things necessary to accomplish the purposes of the leasing act, is the discretionary authority to prescribe conditions with respect to the exercise of the preference right to a permit or lease accorded by that act..... 405

**Section 37.—Valid Claims.**

See *Coal Lands*, 6.

65. The term "valid claims" as used in section 37 of the act of February 25, 1920, relates to unperfected claims to mineral lands and does not contemplate a completed grant of nonmineral lands to a State in aid of its common schools..... 231

## Oil and Gas Lands—Contd. Page

## Section 87.—Valid Claims—Continued.

66. The fact that one claiming oil and gas land under a placer location gave financial assistance to another who drilled a test well and discovered oil upon other land in the locality, does not alone constitute such diligent prospecting by the former as to bring the land in his claim within the exception clause of section 37 of the act of February 25, 1920. 348

67. The exception clause of section 37 of the act of February 25, 1920, did not confer upon a claimant of a group of placer claims of oil and gas lands, upon which no discovery of mineral had been made, a right to retain them unless he had been in actual continuous possession of each claim and in diligent prosecution of prospecting thereupon up to the time of the passage of that act. 348

## Oklahoma.—Act of March 4, 1923.

68. The allowance of an application for any interest in public lands is, as a rule, controlled by the status of the land at the time of the allowance, rather than at the date of the application, and where, at the time action upon an application for a permit to prospect for oil and gas in the bed of Red River, Oklahoma, was taken, the lands were *sub judice*, rejection of the application was proper. 534

## Extensions of Permits.—Act of January 11, 1922.

See 16, 27, 28, *supra*; Alaska, 2.

69. Instructions of June 26, 1924, extension of time for beginning drilling operations under oil and gas permits; Circular No. 801, amended. (Circular No. 946). 567

70. Group development under an oil and gas prospecting permit issued pursuant to the act of February 25, 1920, is not recognized as performance of the conditions of the permit, but as such diligence in an effort to procure the performance necessary to warrant the extension of time authorized by the act of January 11, 1922. 348

71. The act of February 25, 1920, contains a positive direction that oil and gas deposits be disposed of only as provided therein, and is mandatory to that extent, but the act of January 11, 1922, vests the Secretary of the Interior with special discretionary powers with respect to the granting of extensions of time for the performance of the conditions in prospecting permits. 348

72. The Department can not sanction the granting of extensions of prospecting permits under the act of January 11, 1922, where permittees have idly awaited development by others with the expectation, upon the proving of the structure, to then secure drilling, and, upon discovery, claim a reward which was primarily intended for those proving the structure. 546

## Oil and Gas Lands—Contd. Page

## Extensions of Permits.—Act of January 11, 1922—Continued.

73. A permittee who enters into a contract with a drilling contractor in terms which preclude him from enforcing drilling within the time prescribed in the permit will not be granted an extension of time within which to commence drilling on the plea that lack of diligence should be attributed to the contractor and not to the permittee. 610

74. A drilling contract made contingent upon the success of, or to follow a test well to be drilled elsewhere on a structure, is not such a contribution to the test as to warrant an extension of time under the act of January 11, 1922. 610

## Oklahoma.

See *Indian Lands*, 5; *Oil and Gas Lands*, 68; *Survey*, 1; *Town Site*, 1, 2.

## Oregon.

See *Laches*, 1.

## Oregon and California Railroad Lands.

See *Mining Claim*, 16.

1. Instructions of April 14, 1924, Oregon and California Railroad and Coos Bay Wagon Road grant lands; sale of timber. (Circular No. 928). 376

## Patent.

See *Accretion*, 2; *Assignment*, 3; *Contest*, 3; *Homestead*, 2, 11; *Indemnity*, 2; *Indian Lands*, 11; *Jurisdiction*, 1, 2; *Mineral Lands*, 1, 3; *Mining Claim*, 4, 6, 11, 12; *Mortgagee*, 1; *Notice*, 8; *Oil and Gas Lands*, 1, 5, 7; *Potash Lands*, 4; *Public Lands*, 1, 2; *Railroad Grant*, 1; *Repayment*, 3, 4, 5, 12, 13; *Riparian Rights*, 2, 3, 5; *Survey*, 3.

1. Instructions of July 5, 1924, State Indemnity selections; form of patent, act of April 14, 1914. 572

2. Where the question arises whether a patent, issued on an entry in accordance with the official plat of survey existing at date of entry, conveyed title to adjoining lands added by accretion, it is competent for the Land Department to decide whether the accreted land is public land subject to disposal or privately owned land over which it has no jurisdiction. 10

3. When the Land Department has once finally adjudged that the title to accreted land passed with the patent conveying the adjoining land, it is competent for it to take such action, within the scope of its powers, as will render its judgment effective, and, to this end, it may issue a supplemental patent in order that such determination may be given the fullest effect and be in such form as to become regularly a matter of local record. 10

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4. Section 2448, Revised Statutes, permits of the issuance of a patent in the name of a deceased person, and where a patent is thus issued, rights under it may inure to the benefit of the remote grantees of such person. .... 10
5. Actual manual delivery of a patent issued for public land, subject to disposition under the public land laws, is not essential to the passing of title to the patentee, and the Land Department can not retain jurisdiction by withholding the delivery of the patent after it has been signed, sealed, countersigned, and recorded. .... 16
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8. Where by statute payment of the purchase price is all that remains to be done by one in order to acquire title to a tract of non-mineral public land, payment thereof entitles the purchaser to an unrestricted patent; if, prior thereto, there had been no withdrawal, classification, or report that the land, was prospectively valuable for mineral, unless the Government assumes the burden of proof and shows that the land was of known mineral character at that time. .... 242
9. A pending application for patent under the placer mining laws of oil and gas lands should be denied and finally disposed of before the lands are offered for lease under competitive bidding. .... 262
10. An unrestricted patent issued by the Government conveying public lands abutting upon a nonnavigable lake in the State of Montana, in which the common law with respect to riparian proprietorship has been adopted, carries with it an absolute title to the lake bed. .... 281
11. A patent for public lands in Alaska, entered subject to the provisions and reservations of the act of March 8, 1922, should contain a reservation of only that character of mineral for which the land was reported or believed to be valuable. .... 497
12. The fact that an applicant for a patent to public land consents to the insertion of a reservation in the patent does not authorize the Land Department, in the absence of a statute prescribing it, to incorporate such reservation therein. .... 623

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13. A protest by one claiming under an oil lease executed by a homestead entryman against the entryman's consent to take a limited patent as prescribed by the act of July 17, 1914, will not lie where at the time of the submission of final proof the land was known to be prospectively valuable for petroleum deposits. .... 665
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## Payment.

See *Repayment; Coal Lands*, 8, 16, 26; *Coal Trespass*, 1; *Desert Land*, 7; *Entry*, 3; *Fort Assiniboine Lands*, 1, 2; *Homestead*, 12; *Indian Lands*, 1, 2, 4, 8; *Patent*, 8; *Potash Lands*, 2; *Reclamation*, 1, 3, 5, 6, 7, 9, 12; *Repayment*, 2; *Supervisory Authority*, 3; *Timber and Stone*, 4; *Timber Cutting*, 1, 2; *Vested Rights*, 4; *Words and Phrases*, 9.

1. The Secretary of the Interior, in whom the extension act of August 13, 1914, imposed the authority to fix the date for payment of operation and maintenance charges in connection with irrigation projects as of the date fixed for each project, may for sufficient reason change the due date for future payments and modify the contract without violation of either the letter or the spirit of the act of May 15, 1922, and without invoking the procedure therein provided for confirmation of contracts under the latter act. .... 143
2. Moneys paid by grantees under the act of March 4, 1911, for timber cut from their rights of way should be deposited in the Treasury as funds arising from the sale of public lands and not to the "account of depredations upon public lands." .... 608

## Penal Code.

See *Attorney*, 1.

## Permits.

See *Coal Lands; Oil and Gas Lands; Phosphate Lands; Potash Lands; Saline Lands*.

## Phosphate Lands.

1. Phosphate regulations of May 23, 1924; paragraphs 4 and 5, Circular No. 696, amended. (Circular No. 936). .... 503
2. The act of February 25, 1920, contains no provision authorizing the issuance of permits to prospect for phosphate or to award leases as a reward for discoveries, but there is vested in the Secretary of the Interior discretionary authority to fix by general regulations the terms under which leases may be awarded under section 9 of that act. .... 427

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3. The general phosphate regulations of May 22, 1920, being applicable to leases in proven fields, do not contemplate a situation in which considerable preliminary work is necessary before the actual opening of a mine can be undertaken, and, in order to make effective the purpose of the leasing act, it is clearly the duty of the Secretary of the Interior to prescribe such terms for leases as will promote the development of unproven fields.....	427	See <i>Appeal</i> , 1, 2; <i>Application</i> , 1; <i>Contest</i> , 2, 4, 5; <i>Fees</i> , 3; <i>Homestead</i> , 22; <i>Notice</i> , 1, 2, 4, 5; <i>Officers</i> , 4; <i>Oil and Gas Lands</i> , 15, 19; <i>Patent</i> , 9; <i>Reclamation</i> , 1, 2; <i>Res Judicata</i> , 1; <i>School Land</i> , 3.	656
4. On and after the passage of the leasing acts of October 2, 1917, and February 25, 1920, lands which at the time of an attempted location on account of metalliferous deposits are known to be valuable for any of the minerals named in those acts are not subject to appropriation under the preexisting mining laws.....	650	1. Instructions of October 10, 1924, abrogating Rule 61 of Practice. (Circular No. 962).....	149
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<b>Potash Lands.</b>		6. The assessment of costs in protest proceedings against oil and gas permits is to be governed by the second sentence of Rule 53 of Practice, which specifies that each party shall bear his proportionate share in the examination and cross-examination of witnesses.....	637
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2. Potash regulations of September 24, 1924, survey of unsurveyed lands, act of October 2, 1917; Circular No. 594, amended. (Circular No. 961).....	644	See <i>Repayment</i> , 18.	
3. No authority exists for the issuance concurrently of a permit to prospect for potassium under the act of October 2, 1917, and of a permit to prospect for sodium under the act of February 25, 1920, for the same tract of land.....	641	<b>Preference Right.</b>	
4. The act of October 2, 1917, provides that upon satisfactory showing of valuable deposits in lands embraced within a prospecting permit issued thereunder, a patent shall be issued for one-fourth of the land covered by the permit, and the provision in section 2 of the act restricting further disposals of the remaining lands to leases clearly contemplates that the right of the permittee to an unlimited patent should be restricted only by prior disposals under acts which authorize the issuance of such patents.....	641	See <i>Carey Act</i> , 1; <i>Coal Land</i> , 7, 8, 12, 14, 15; <i>Commissioner of the General Land Office</i> , 1; <i>Contest</i> , 6; <i>Fees</i> , 2; <i>Homestead</i> , 21; <i>Military Service</i> , 2; <i>Notice</i> , 3, 6, 7; <i>Oil and Gas Lands</i> , 11, 15, 34, 39, 40, 46, 48, 49, 64; <i>Practice</i> , 7; <i>Relinquishment</i> , 4; <i>Supervisory Authority</i> , 5; <i>Town Site</i> , 2; <i>Waiver</i> , 1, 2; <i>Water Right</i> , 1.	
<b>Power Sites.</b>			
See <i>Mining Claim</i> , 16; <i>Right of Way</i> , 1, 2.			
1. The issuance of a license for a water power project as to a tract of land within a national forest which was relinquished to the United States as base for a lieu selection under the act of June 4, 1897, is a disposition of the land within the contemplation of section 2 of the act of September 22, 1922, and precludes the Secretary of the Interior from quitclaiming it pursuant to section 1 of the latter act.....	660		

**Preference Right—Contd.**

Page

1. The provision in section 2 of the act of September 21, 1922, requiring that applications for the exercise of preference rights accorded by the act to persons who had placed valuable improvements upon or reduced to cultivation the lands specified therein, be filed within ninety days from the passage of the act or from the filing of the plat of survey, is merely a limitation upon the exercise of the preference right privilege, and does not restrict the authority of the Secretary of the Interior, conferred by the general provisions of the act, to sell, in his judgment and discretion, the lands, not adversely claimed, to any citizen of the United States. 498

**Private Entry.**See *Warrant*, 1.

1. Prior to the subjection of public lands to private entry four preliminary steps were required by the statutes: (a) survey into legal subdivisions; (b) a proclamation by the President exposing the lands to public sale; (c) publication of notice of sale; (d) offering at public outcry by the register of the United States land office of the district in which the lands were situated; and the lands remaining undisposed of at the close of such sale thereafter became subject to private entry. 438

**Procedure.**See *Practice*.**Prospecting Permits.**

See *Coal Lands*; *Oil and Gas Lands*; *Phosphate Lands*; *Potash Lands*; *Saline Lands*.

**Public Lands.**

See *Accretion*, 2; *Damages*, 2; *Isolated Tracts*, 1; *Jurisdiction*, 2; *Lake*, 1; *Land Department*, 3; *Mining Claims*, 7; *Officers*, 1, 2; *Railroad Grant*, 3; *Riparian Rights*, 2, 5; *Supervisory Authority*, 1, 5; *Survey*, 3, 6.

1. Whenever the question arises in any court, State or Federal, as to whether the title to land, which had once been the property of the United States, has passed, that question must be resolved by the laws of the United States; but when, according to those laws, the title shall have passed, then that property, like other property in the State, is subject to the laws of the State, so far as those laws are consistent with the admission that the title passed and vested according to the laws of the United States. 678

2. With respect to public lands bordering on nonnavigable bodies of water, the Government assumes the position of a private owner, and when it parts with its title to those lands, without reservation or restriction, the extent of the title of the patentee to the lands under water is governed by the laws of the State within which the lands are situated. 679

**Purchase.**

Page

See *Coal Lands*, 16, 17; *Homestead*, 12, 13; *Indian Lands*, 8; *Preference Right*, 1; *Private Entry*, 1; *Reclamation*, 8, 10, 11.

**Purchaser.**

See *Contest*, 6; *Forest Lieu Selection*, 1, 2; *Indian Lands*, 1, 4; *Mortgage*, 2; *Patent*, 8; *Warrant*, 3.

**Railroad Grant.**

See *Desert Land*, 7; *Repayment*, 2, 6.

1. Instructions of April 28, 1924, Northern Pacific Railroad grant lands; suspension of patents. (Circular No. 931) 380

2. Neither the provisions of the act of July 1, 1898, nor those of the act of February 27, 1917, amendatory thereof, respecting relinquishments by the Northern Pacific Railway Company in favor of settlements upon unsurveyed lands within the limits of its grant, mandatorily require that company to relinquish or recover any tract of land within its grant in favor of a settler. 539

3. The Northern Pacific Railway Company is the legal successor of the Northern Pacific Railroad Company with respect to the benefits of the grant of public lands made to the latter company. 539

**Railroad Land.**

See *Homestead*, 12, 13; *Oregon and California Railroad Lands*, 1; *Right of Way*, 1; *Selection*, 1; *Withdrawal*, 1.

**Reclamation.**

See *Arid Land*, 1; *Homestead*, 7-15; *Officers*, 1, 2; *Oil and Gas Lands*, 2; *Payment*, 1; *Right of Way*, 2, 4; *Supervisory Authority*, 1, 2, 3; *Withdrawal*, 8.

1. Regulations of June 2, 1924, reclamation projects; relief to water users under the extension act of May 9, 1924. 542

2. Instructions of December 9, 1924, Minnesota drainage laws; proceedings after expiration of period of redemption. (Circular No. 266) 685

3. The act of May 15, 1922, which authorized the Secretary of the Interior to enter into contracts with irrigation districts with respect to payments of water users' charges, did not modify the act of February 21, 1911, and existing contracts entered into under the latter act may stand as made or be modified under the same authority which authorized their execution; likewise, new contracts may be made thereunder without resort to the court proceedings specified for contracts under the former act. 142

4. The act of May 15, 1922, has no retroactive effect upon contracts theretofore made under proper authority and such contracts are not, therefore, dependent for their validity upon the court confirmation specified in the proviso to that act. 143

**Reclamation—Continued.**

Page

5. The act of August 13, 1914, provided for the payment of irrigation construction charges upon a specified date, the only authority for change of which is contained in the act of May 15, 1922, and where the latter act is invoked to change the date of payment under a prior contract, the procedure prescribed therein must be followed in order to give validity to the amended contract..... 143

6. Upon the issuance of public notices pursuant to section 4 of the reclamation act of June 17, 1902, the construction charges specified in the notices become fixed charges against the lands, and the acceptance and approval of water-right applications in a sense create a contractual relation between the applicants and the United States for the payment of the charges by the water users and the furnishing of irrigation water by the Government that can not be changed except with the consent of both parties..... 223

7. Inasmuch as the acts of June 17, 1902, and August 13, 1914, did not peremptorily declare in mandatory language that forfeitures must be declared, or that they will necessarily result by operation of law as soon as defaults in payments by water users on reclamation projects have occurred; it rests within the sound discretion of the Secretary of the Interior to determine whether an entryman may thereafter be permitted to cure the default by payment of the charges..... 224

8. Lands acquired by purchase or condemnation pursuant to section 7 of the reclamation act, when no longer needed for reclamation purposes, can be disposed of only at public auction and the proceeds derived therefrom must be placed in the reclamation fund to the credit of the particular project; such lands and the oil and gas deposits therein are not subject to prospecting or lease under the act of February 25, 1920..... 308

9. Public lands, withdrawn for a reservoir site, which can not be restored to the public domain without damage to the project, or which have, because of improvements placed thereon, become lands that may be sold only for the benefit of the reclamation fund, are not subject to the operation of the leasing act of February 25, 1920..... 309

10. Lands reconveyed to the United States by the State of New Mexico for reclamation purposes pursuant to the enabling act of June 20, 1910, which contains an indemnity provision as consideration for such transfers, occupy a status similar to that of withdrawn public lands, rather than that of lands acquired by purchase or condemnation, and the granting of permits to prospect for oil or gas upon such lands will be dependent upon the determination of whether or not their restoration will be detrimental to the project.... 309

**Reclamation—Continued.**

Page

11. Lands withdrawn for a reservoir site or similar reclamation purposes which are essential to the project, and lands acquired by purchase or condemnation for the exclusive use of the project, may be developed for their mineral resources only by temporary leases for periods not inconsistent with the needs of the project, and the proceeds therefrom must be placed in the reclamation fund to the credit of that project..... 309

12. The power of Congress to delegate to an agency of a State the authority to provide for the reclamation of public arid lands within a State irrigation district, and the right of such instrumentality to assess the lands for the cost of their reclamation, can not be questioned by a mere applicant to make a desert-land entry. 521

**Reconveyance.**

See *Power Sites*, 1; *Railroad Grant*, 2; *Reclamation*, 10; *Relinquishment*, 1-4.

**Records.**

See *Coal Lands*, 16; *Fees*, 1; *Mining Claim*, 13; *Mortgage*, 1, 2; *Notice*, 4, 5, 6; *Officers*, 4; *Oil and Gas Lands*, 10; *Relinquishment*, 4; *Warrant*, 2.

1. Instructions of February 5, 1924, notations upon the records of local United States land offices of cancellations of entries, prospecting permits, leases, and selections, and notations of relinquishments and withdrawals of applications. (Circular No. 915)..... 299

2. Instructions of April 23, 1924, notation of cancellation of oil and gas permits; Circular No. 915, modified. (Circular No. 929)..... 387

3. Instructions of May 28, 1924, notation of cancellation of oil and gas permits; Circular No. 926, amended. (Circular No. 939)..... 509

4. Instructions of November 13, 1924, notation of cancellation of oil and gas permits; Circulars Nos. 929 and 939, amended. (Circular No. 966)..... 659

**Redemption.**

See *Reclamation*, 2.

**Register and Receiver.**

See *Commissioner of the General Land Office*, 1; *Contest*, 5; *Practice*, 3.

**Rehearing.**

See *Practice*, 2.

**Reinstatement.**

See *Indemnity*, 1; *Oil and Gas Lands*, 12.

**Relation.**

See *Coal Lands*, 21; *Settlement*, 1.

**Relief.**

See *Oil and Gas Lands*, *Secs.* 18, 19, 20; *Application*, 1; *Coal Lands*, 6; *Cultivation*, 2, 3; *Oil and Gas Lands*, 50.

**Relief to Water Users.**

See *Reclamation*, 1, 3, 7.

**Relinquishment.**

See *Forest Land Selection*, 1; *Indian Lands*, 8; *Mortgage*, 1, 2; *National Forests*, 3; *National Parks*, 1; *Oil and Gas Lands*, 23; *Power Sites*, 1; *Railroad Grant*, 2; *Records*, 1; *Repayment*, 3, 8, 17, 18; *Survey*, 7.

1. A letter written by a homestead entryman to a United States land office containing the statement, "I wish to relinquish all my claims on the land," is not sufficiently definite in its terms to indicate a present intention to relinquish the particular lands embraced in the entry.....

165

2. A relinquishment of a homestead entry which, except for the relinquishment, would have been confirmed under the proviso to section 7 of the act of March 3, 1891, estops the entryman from obtaining the benefits of the exchange of entry provision of the act of January 27, 1922, notwithstanding that the relinquishment was induced by adverse proceedings by the Government, instituted in accordance with the then existing practice, afterwards held to be unauthorized.....

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3. A voluntary relinquishment, executed and filed in connection with a claim for repayment of purchase money paid upon a canceled entry which, except for the relinquishment and refund of purchase price, would have been entitled to confirmation under the act of March 3, 1891, amounts to a quitclaim, for a valuable consideration, of all the entryman's right, title, and interest in and to the lands embraced therein, and precludes him from afterwards invoking the benefits of the exchange-of-entry provision of the act of January 27, 1922.....

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4. A relinquishment of an oil and gas prospecting permit does not, of its own force, relieve the lands from the segregative effect created by the permit, and the filing of an application for a permit, predicated upon the relinquishment, prior to the cancellation of the permit by the Commissioner of the General Land Office and notation thereof upon the records of the local land office, does not confer upon the applicant any right to notice of the disposition of the prior existing claim or entitle him to any preference in the allowance of his application when the lands are formally restored.....

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**Repayment.**

See *Relinquishment*, 3; *Statutes*, 14.

1. In coupling the expression "can not be confirmed" with the term "erroneously allowed," as those phrases are used in section 2 of the act of June 16, 1880, which authorized repayment where an entry was "erroneously allowed and can not be confirmed," the law necessarily contemplated an entry with reference to which the defect could not be cured.....

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**Repayment—Continued.**

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2. Allowance of a desert-land entry under the act of March 3, 1877, for lands within the primary limits of a railroad grant, upon original payment of 25 cents per acre, was not erroneous, and, where, during its existence it could have been completed at the rate of \$1.25 per acre under regulations then in force, it was subject to confirmation within the meaning of the repayment act, and even under subsequent regulations to meet a new interpretation of the law, such an entry, if then existing, could have been completed upon payment of the unpaid portion of the legal price; hence, under either view, a proper case for repayment is not presented.....

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3. A claim for repayment based upon a relinquishment of a homestead entry after March 3, 1909, and subsequent to the inclusion of the land within a coal withdrawal rather than accept a surface patent comes within the purview of the act of March 26, 1908, and must be filed within the statutory period specified in the act of December 11, 1919.....

297

4. Where an entry, allowed unconditionally, may be confirmed as to a surface patent, such entry is not one "erroneously allowed" within the contemplation of section 2 of the repayment act of June 16, 1880.....

298

5. An applicant who has been granted a water right in connection with a reclamation homestead application for land within a petroleum reserve is entitled, upon withdrawal of the application, rather than accept a surface patent, to repayment of the water charges, where he had no knowledge of the petroleum withdrawal and the public notice pursuant to which he made payment failed to state that any of the land was within a reserve.....

379

6. A desert-land entryman who was required to make an initial payment of 50 cents per acre for land within the reserved limits of a railroad grant is not entitled to repayment under the repayment statutes on the ground that the desert-land act of March 3, 1877, fixed the initial price of 25 cents per acre for all desert-land entries.....

416

7. The allowance of an entry for land subsequently included within a coal withdrawal is not an erroneous allowance within the purview of the repayment act of June 16, 1880, notwithstanding that at the time of its abandonment by the entryman there existed no law under which it could have been confirmed as to a surface patent.....

418

8. A claim for repayment under the act of March 26, 1908, based on the relinquishment of an entry because of its inclusion within a coal withdrawal, can not be allowed unless it is shown as a fact that the withdrawal was the determining factor in inducing the relinquishment.....

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## Repayment—Continued.

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9. An allowance of a desert-land entry for land withdrawn from entry under the coal land laws only is not erroneous, and its cancellation for failure of the entryman to submit proof rather than to prove the noncoal character of the land is not a ground for repayment under the act of June 16, 1880..... 429

10. Under section 2 of the act of June 16, 1880, which provides for repayment where an entry has been erroneously allowed and can not be confirmed, the fact that an entry is incapable of confirmation is not alone sufficient, but its allowance must also have been erroneous.... 429

11. The requirement contained in the proviso to section 2 of the act of December 11, 1919, that a claim for repayment must thereafter be presented within two years from the issuance of patent or from the passage of the act, is mandatory and can not be waived because the claimant did not have knowledge of the act for more than two years after its enactment..... 566

12. One who, after having filed an application for a mineral patent, quitclaims to the Government his interest in the mining claims and obtains a lease under the act of February 25, 1920, is not entitled to repayment of the filing fee, inasmuch as such transaction amounts to a voluntary abandonment of the original claim and not to a rejection of the application..... 576

13. The filing fee paid in connection with an application for a mineral patent is no more a fee for personal services of the local officers than other fees and commissions paid in connection with an entry of public land and should be repaid in a proper case..... 576

14. An application for coal lease under section 2 of the act of February 25, 1920, is a filing within the meaning of the repayment statutes; and the coal-leasing regulations of April 1, 1920, declaring a forfeiture of the deposit made by a successful bidder in case of his default, did not intend to preclude repayment of such deposit where repayment is warranted under the act of March 26, 1908..... 589

15. Where an applicant for a coal lease under section 2 of the act of February 25, 1920, fails to comply with the terms of the bid, and his application is rejected, without fraud or fault on his part, the application becomes one rejected within the contemplation of the repayment act of March 26, 1908..... 589

16. A mineral entry, the allowance of which was wrongfully procured by false and misleading evidence, subsequently canceled upon charges that the land was not valuable for minerals and that the requisite patent expenditures had not been made, is not an erroneously allowed entry within the purview of the repayment act of June 16, 1880, where the record was not obviously so incomplete and defective on its face as to warrant its denial in the first instance..... 599

## Repayment—Continued.

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17. The repayment statutes are not to be deemed to offer an option to a claimant either to defend against charges involving actual fraud and protect his claim or to relinquish the land and take instead the purchase price... 602

18. Where a coal entry is canceled upon a relinquishment filed during the pendency of adverse proceedings based upon a charge of fraud it will be presumed that the purpose of the relinquishment was to avoid the issue and to dispose of the charge without adjudication upon the ultimate merits, and an applicant for repayment of the purchase price under the act of March 26, 1908, must assume the burden of proof and establish a *prima facie* case as to absence of fraud..... 602

19. The allowance of a timber and stone entry for land subsequently withdrawn under the act of June 22, 1910, for its coal contents, is not an erroneous allowance within the purview of section 2 of the repayment act of June 16, 1880, where the entry, allowed upon the strength of a sworn statement that the land was chiefly valuable for its timber, was canceled because the land was found to be more valuable for grazing purposes..... 627

## Reservation.

See *Indian Lands; National Forests; National Monuments; National Parks; Withdrawal; Fort Assiniboine Lands*, 1; *Homestead*, 18; *Indemnity*, 3; *Indian Lands*, 3, 5, 7; *Mineral Lands*, 2; *Oil and Gas Lands*, 1, 7, 35, 57; *Patent*, 11, 12, 13; *Public Lands*, 2; *Right of Way*, 2, 4; *School Land*, 4; *Timber and Stone*, 2; *Withdrawal*, 7.

1. The act of July 17, 1914, contemplates a reservation of mineral deposits in lands embraced in unperfected nonmineral entries wherever it appears from geologic data that prospecting operations are warranted, and lands having such prospective value are "valuable for" minerals within the meaning of the act, although no actual demonstrated existence of mineral deposits has been discovered..... 276

2. A reservation created by the Secretary of the Interior pursuant to section 10 of the act of May 14, 1893, setting apart a particular area of public land in Alaska for the benefit of the Indians or natives does not vest them with actual title..... 315

3. A temporary withdrawal made with the view to classification and appraisal of land for its coal contents does not constitute a "reservation" within the meaning of the proviso to section 6 of the enabling act of July 16, 1894, relating to the grant of public lands to the State of Utah for school purposes. 516

4. Where Congress has by separate acts conferred specific jurisdiction upon the Department of the Interior and the Department of Commerce, respectively, to dispose of public lands within abandoned military and lighthouse reservations, the former department, having assumed jurisdiction with the consent of the latter, may, under its coordinate authority, dispose of lands which were formerly within both a military reservation and a lighthouse reservation..... 559

**Reservoir Lands.**

Page

See *Oil and Gas Lands*, 2; *Reclamation*, 9, 11; *Right of Way*, 2, 3.

**Residence.**

See *Citizenship*, 1, 2; *Homestead*, 5, 19; *Oil and Gas Lands*, 11.

**Res Judicata.**

See *Land Department*, 1; *Patent*, 3.

1. The application by the Department of the rule of *res adjudicata* to controversies in which final decisions have been rendered by it, is based upon the well-established principle that there must come a time when there is to be finality of action in order to prevent endless confusion in matters in which parties seek readjudication in the light of changes resulting from subsequent rulings of the Department or of the courts..... 173

**Restorations.**

See *Oil and Gas Lands*, 2, 10, 12, 23; *Reclamation*, 10; *Relinquishment*, 4; *Town Site*, 1, 2.

**Revised Statutes.**

See *Table of*, page xxxii.

**Right of Way.**

See *Homestead*, 12, 13; *Payment*, 2; *Statutes*, 10; *Timber Cutting*, 1, 2; *Words and Phrases*, 14.

1. Easements over the public lands may be granted under the various Federal Statutes appertaining thereto to a commission created and empowered by a State legislature for the purpose of acquiring a site and of constructing and maintaining a tunnel for the use of railroads, power, telegraph and telephone lines, transportation of water, and as a highway for vehicles, notwithstanding that the actual operation of these utilities is to be conducted by others, where their maintenance is for the public interest..... 359

2. The inhibition in the act of March 3, 1921, against the granting thereafter of any permit or other authorization for reservoirs or other works for the storage or carriage of water within the limits of any national park or national monument without specific authority of Congress, is applicable to such works for irrigation purposes as well as for power purposes, and precludes the granting of an extension of a right of way over such lands for an irrigation reservoir constructed pursuant to the act of March 3, 1891..... 388

3. While an entry upon land, segregated by a previously issued oil and gas prospecting permit, and the construction of a reservoir thereupon without protest by the permittee, in anticipation of the allowance of a soldiers' additional homestead application which depended wholly upon departmental discretion for its validity, is not an entry under color of right, but a trespass, yet where it is shown that the reservoir is reasonably essential to the working of the land under lease and that the interests of the Government will best be protected through the granting of a revocable permit, an easement may be granted pursuant to the act of February 15, 1901..... 626

**Right of Way—Continued.**

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4. The inhibition in the act of March 3, 1921, against the granting of rights of way over public lands within national parks and national monuments without specific authority of Congress is applicable to the extension of canals for the irrigation of Indian lands, and nothing in the act of August 30, 1890, reserving a right of way for ditches or canals constructed by authority of the United States, or in the appropriation acts providing for the construction of irrigation works for the benefit of the Indians, grants that authority..... 569

**Riparian Rights.**

See *Accretion*, 1, 2; *Mineral Lands*, 3; *Navigable Waters*, 1; *Oil and Gas Lands*, 1; *Patent*, 2, 3, 10; *Public Lands*, 2; *Survey*, 1, 2, 3, 6.

1. Upon the admission of Louisiana to the Union the United States relinquished all claim to the lands underlying navigable waters in that State, and the transfer of that ownership being complete and final, the rule that the title to submerged lands remains after their reappearance in the one who owned the lands prior to their submergence can not be invoked by the United States with respect to an area covered with a body of navigable water at the time that the State was admitted..... 180

2. Prior to the issuance of an unrestricted patent by the Government to its lands abutting upon a nonnavigable lake, the law of the State in which the lands are situated has no effect upon the title to the lands in the lake bed, and the United States may dispose of the bed of the lake separate from the uplands without regard for local law..... 281

3. An unrestricted patent issued by the Government, conveying lands abutting on a nonnavigable lake, divests it of all title to or interest in the lake bed, including minerals therein, and the extent of the title of the riparian proprietor is thereafter to be determined in accordance with the laws of the State in which the lands lie..... 284

4. Montana has specifically adopted by statute the common-law rule of ownership by riparian proprietors of lands underlying non-navigable bodies of water wherever not inconsistent with its constitution, or the constitution and statutes of the United States..... 285

5. A patent conveying title without reservation to public lands abutting upon a non-navigable lake in the State of Montana includes, in accordance with the common law, the lake bed as appurtenant to the uplands, and the fact that it has been the settled policy of Congress to reserve saline lands from disposal, except pursuant to special laws, does not confer upon the Land Department any jurisdiction thereafter to issue a permit to prospect for sodium in the bed of the lake.... 285

**Saline Lands.**

See *Mineral Lands*, 3; *Oil and Gas Lands*, 1, 5, 63; *Phosphate Lands*, 4; *Potash Lands*, 3; *Riparian Rights*, 3, 5.

**School Land.**

Page

See *Homestead*, 24; *Indemnity*, 1, 2, 3; *Mineral Lands*, 5; *Oil and Gas Lands*, 65; *Reservation*, 3; *Withdrawal*, 7.

1. Where a township plat has been superseded by a corrected plat and there is a variance as to the acreage shown upon those plats in certain designated sections granted to a State for school purposes, a determination of the measure of the grant in those sections will be made in accordance with the plat subsisting at the date of the grant. 147

2. The grant of certain specified sections of public lands for school purposes made to the State of New Mexico by its enabling act excepted mineral lands, and where, prior to its admission, granted sections had been classified as coal and offered for sale at a fixed price, those sections were *prima facie* not subject to the operation of the grant, but the burden of proof was cast upon the State to establish that the classification was erroneous. 219

3. The Land Department will afford a State an opportunity to protest against any proposed disposal of lands within granted school sections which are alleged not to have passed under its school grant by reason of their mineral character. 219

4. The language used in the proviso to section 6 of the enabling act of July 18, 1894, which excepted from the grant of public lands to the State of Utah for school purposes, those lands embraced in "Indian, military, or other reservation of any character," is sufficient to show an intention of including within its exception areas withdrawn for their prospective oil and gas values. 231

5. Where mineral lands are excepted from a grant of public lands for school purposes, a petroleum withdrawal prior to survey has the effect of stamping the lands as *prima facie* mineral in character and, upon the approval of the survey, suspends the operation of the grant. 231

6. A petroleum withdrawal prior to survey of lands which, upon survey, are identified as lands granted to a State for school purposes, if nonmineral, has the effect of casting the burden of proof upon the State to produce evidence sufficiently convincing to warrant their nonmineral classification. 231

7. Where objection is made to a ruling by the Commissioner of the General Land Office that a petroleum withdrawal of lands which, upon subsequent survey, are found to be school sections, is sufficient to prevent the title from passing to the State upon the approval of the survey, determination of that point in order to fix the burden of proof and the necessity for a hearing should be insisted upon by the State before a hearing is had, otherwise proceeding with the hearing will be construed as an election to accept the ruling. 231

**School Land—Continued.**

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8. When the final act is performed which, under the law, would permit a school grant to attach, and there has been no reservation or classification of the land as mineral, the presumption arises that it became the property of the State under its grant. 516

9. The fact that at the date of the approval of the survey land within a designated school section was known to be coal in character does not, of itself, destroy the presumption that the land passed to the State under its school land grant, and, to overcome that presumption, the Government must assume and sustain the burden of proof. 516

**Scrip.**

See *Vested Rights*, 3; *Warrant*, 1, 2, 3.

**Secretary of the Interior.**

See *Coal Lands*, 6, 8, 13, 19; *Homestead*, 25; *Indemnity*, 2; *Indian Lands*, 5; *National Parks*, 1; *Oil and Gas Lands*, 59, 64, 71; *Payment*, 1; *Phosphate Lands*, 2, 3; *Preference Right*, 1; *Reclamation*, 7; *Supervisory Authority*, 1, 2, 3, 4, 6; *Survey*, 5; *Withdrawal*, 8.

1. The Secretary of the Interior may delegate to the First Assistant Secretary and to the Assistant Secretary not merely administrative or ministerial duties, but also the duty to act judicially in review of the actions of the head of a bureau of his Department, and in matters requiring the exercise of such delegated authority, their powers are coordinate and concurrent with those of the Secretary himself. 149

2. In issuing instructions prescribing the duties of an officer of his department, pursuant to an act of Congress creating the office, the Secretary of the Interior may include duties fixed by a Territorial legislature, but in doing so he can not go beyond the intent and purpose of the Federal statute or require the performance of duties not contemplated by it. 365

**Selection.**

See *Assignment*, 3; *Forest Lieu Selection*, 1, 2; *Indemnity*, 1, 2, 3; *National Parks*, 1; *Patent*, 1; *Records*, 1; *Vested Rights*, 1; *Withdrawal*, 1, 7.

1. Instructions of July 23, 1924, selections; approved form of nonmineral affidavit; circular of July 9, 1894 (19 L. D. 21), revoked. (Circular No. 956). 587

2. A selection of unsurveyed land made under the act of August 5, 1892, which authorizes the selection of nonmineral public lands, so classified at the time of actual Government survey but which further expressly recognizes the privilege of selecting unsurveyed lands, nonmineral in fact, is not defeated by the mere observation of the surveyor that mineral indications are found in the township, especially where the selection has stood for a long time and any doubt implied from the surveyor's remarks has since been removed by close examination and the selected tract found to be nonmineral in fact. 583

**Settlement.**

See *Carey Act*, 1; *Homestead*, 3, 24; *Oil and Gas Lands*, 6, 11, 18, 47; *Railroad Grant*, 2; *Survey*, 3.

1. When a valid settlement precedes a withdrawal, classification or report that the lands are of mineral character, an entry, predicated upon such claim, afterwards allowed pursuant to the act of July 17, 1914, relates back to the date of settlement and the rights of the entryman under the homestead laws are to be determined accordingly..... 369

**Settlers.**

See *Oil and Gas Lands*, 6.

**Sodium.**

See *Saline Land; Oil and Gas Lands*, 1, 5, 63; *Riparian Rights*, 5.

**Soldiers and Sailors.**

See *Homestead*, 16, 17; *Military Service*, 1, 2.

**Soldiers' Additional.**

See *Homestead*, 17.

**Statutes.**

See *Attorney*, 1; *Bonds*, 1; *Coal Lands*, 2, 3, 11, 14, 15, 24; *Cultivation*, 2; *Desert Land*, 7; *Forest Lieu Selection*, 1, 2; *Homestead*, 5, 14, 15, 16; *Indemnity*, 2; *Indian Lands*, 5, 9; *Kinkaid Act*, 1; *Land Department*, 3; *Mineral Lands*, 4; *National Forests*, 3; *Officers*, 3; *Oil and Gas Lands*, 22, 39-42, 50-61, 66-68; *Patent*, 4, 7; *Potash Lands*, 4; *Power Sites*, 1; *Preference Right*, 1; *Public Lands*, 1; *Railroad Grant*, 2; *Reclamation*, 3, 4, 5; *Repayment*, 3, 6, 7, 10, 11, 14-17; *Right of Way*, 2, 4; *Secretary of the Interior*, 2; *Timber and Stone*, 1, 2; *Timber cutting*, 1; *Town Site*, 1; *Trade and Manufacturing Site*, 1, 2; *Words and Phrases*, 6.

1. In construing a statute it is permissible to substitute the word "and" for the word "or" when found necessary to do so in order to impart the true legislative intent as gathered from the context and the circumstances attending its enactment..... 153

2. The purpose of the limitation in section 27 of the act of February 25, 1920, prohibiting anyone, except as therein provided, from taking or holding more than one coal lease during the life of such lease in any one State, was, according to the legislative intent, to place a restriction on the number of leases that may be taken or held simultaneously, but not as to the number that may be held in succession.... 153

3. In coupling the expression "can not be confirmed" with the term "erroneously allowed," as those phrases are used in section 2 of the act of June 16, 1880, which authorized repayment where an entry was "erroneously allowed and can not be confirmed," the law necessarily contemplated an entry with reference to which the defect could not be cured.... 161

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4. The language used in the proviso to section 6 of the enabling act of July 16, 1894, which excepted from the grant of public lands to the State of Utah for school purposes, those lands embraced in "Indian, military, or other reservation of any character," is sufficient to show an intention of including within its exception areas withdrawn for their prospective oil and gas values..... 231

5. The term "valid claims" as used in section 37 of the act of February 25, 1920, relates to unperfected claims to mineral lands and does not contemplate a completed grant of nonmineral lands to a State in aid of its common schools..... 231

6. The act of July 17, 1914, contemplates a reservation of mineral deposits in lands embraced in unperfected nonmineral entries wherever it appears from geologic data that prospecting operations are warranted, and lands having such prospective value are "valuable for" minerals within the meaning of the act, although no actual demonstrated existence of mineral deposits has been discovered... 276

7. Where an entry, allowed unconditionally, may be confirmed as to a surface patent, such entry is not one "erroneously allowed" within the contemplation of section 2 of the repayment act of June 16, 1880..... 298

8. A departmental regulation limiting the maximum area over which prospecting of contiguous tracts of public lands for oil and gas may be conducted under one permit to a township, that is, an area 6 miles square, is a liberal interpretation of what constitutes an area in a "reasonably compact form" within the meaning of section 13 of the leasing act, and will not be modified except in special cases..... 353

9. Nothing in the act of February 25, 1920, either directs or suggests that an applicant for an oil and gas prospecting permit shall be entitled in every instance to be awarded a permit for the maximum area authorized by the act..... 353

10. The acts of Congress granting easements over the public lands are to be construed liberally and their spirit and intent effectuated, if possible, where the benefits to be derived therefrom are for the public interest..... 359

11. The act of September 22, 1922, being a remedial statute, should be liberally construed so that its benefits may be extended to all those who come fairly within its scope.... 435

12. A temporary withdrawal made with the view to classification and appraisal of land for its coal contents does not constitute a "reservation" within the meaning of the proviso to section 6 of the enabling act of July 16, 1894, relating to the grant of public lands to the State of Utah for school purposes..... 416

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13. The term "shall be in compact form," as used in section 14 of the act of February 25, 1920, in connection with the granting of a five per cent royalty lease thereunder, does not require that the leased lands be contiguous in all cases, but contemplates that a permittee may, where incontiguous tracts have been included in a prospecting permit, select as a reward for discovery, the legal subdivision upon which the discovery well is located, and such remaining land, as near thereto as is possible, up to the prescribed amount, whether contiguous or noncontiguous. .... 562
14. The allowance of a timber and stone entry for land subsequently withdrawn under the act of June 22, 1910, for its coal contents, is not an erroneous allowance within the purview of section 2 of the repayment act of June 16, 1880, where the entry, allowed upon the strength of a sworn statement that the land was chiefly valuable for its timber, was canceled because the land was found, to be more valuable for grazing purposes. .... 627
15. Supplemental acts relating to the same subject matter may properly be regarded as a legislative interpretation of prior acts. .... 676

**Stock-Raising Homesteads.**

See *Homestead*, 18-30; *Kinkaid Act*, 1.

**Supervisory Authority.**

- See *Coal Lands*, 8, 19, 20; *Homestead*, 25; *Land Department*, 1; *National Parks*, 1; *Oil and Gas Lands*, 59, 64, 71; *Patent*, 3; *Phosphate Lands*, 2, 3; *Preference Right*, 1; *Reclamation*, 7.
1. While there is no Federal statute that prohibits project managers of reclamation projects from acquiring interests in lands, either public or private, within the projects under their supervision, yet it is within the supervisory authority of the Secretary of the Interior to forbid it by appropriate regulation. .... 175
2. The Secretary of the Interior has no general statutory authority to suspend, even temporarily, public notices issued by him pursuant to section 4 of the act of June 17, 1902, of lands irrigable under reclamation projects, nor does he possess supervisory power to do so in the absence of a specific statute authorizing it. .... 223
3. Except where specifically authorized by law, the Secretary of the Interior is not empowered to grant extensions of time, either directly or indirectly, for the payment of charges accruing from individual water users upon reclamation projects. .... 223
4. Pursuant to the supervisory power over the public lands vested in the Secretary of the Interior by section 441, Revised Statutes, that officer is clothed with the authority to cancel a survey executed under the direction of the Commissioner of the General Land Office, which, in the opinion of the former, was unauthorized. .... 438

**Supervisory Authority—Contd. Page**

5. The department will recognize a preferred right to initiate and perfect title in one who in good faith under color of title has taken possession of, occupied, and improved public land under misunderstanding or misinformation as to his legal rights, and it is vested with the discretion to hold the title in the United States until he may be enabled to acquire title under existing law or by special act of Congress. .... 436
6. A change in departmental regulations whereunder it is imperative to deny an application for the reduction of the required area of cultivation which could have been granted under the previously existing regulations is a function within the authority of the Secretary of the Interior conferred by the three year homestead act and does not deprive the applicant of any statutory right. .... 595

**Surface Rights.**

See *Bonds*, 1; *Coal Lands*, 7, 17; *Homestead*, 2, 3, 4, 11; *Mineral Lands*, 2; *Mortgagee*, 1; *Oil and Gas Lands*, 9, 56-63; *Patent*, 7; *Repayment*, 5, 7; *Reservation*, 1; *Right of Way*, 3; *Settlement*, 1; *Timber and Stone*, 1, 2; *Withdrawal*, 1, 5.

**Survey.**

See *Accretion*, 1, 2; *Alaska*, 2; *Homestead*, 12, 13, 24, 28; *Mineral Lands*, 5; *Mining Claim*, 14, 15; *Patent*, 2; *Potash Lands*, 2; *Preference Right*, 1; *Private Entry*, 1; *School Land*, 1, 5, 6, 7, 9; *Selection*, 2; *Supervisory Authority*, 4; *Warrant*, 1; *Withdrawal*, 7.

1. In establishing the side boundaries of claims of riparian proprietors to the area between the original meander line on the north and the medial line of Red River in Oklahoma in accordance with the decisions of the Supreme Court in the case of *Oklahoma v. Texas*, lines should be run from points representing the limits of frontage of the original claims on the meander line to points on the medial line at distances thereon proportionate to the lengths of frontage of the respective abutting owners. .... 216
2. The Land Department, after it has disposed of the adjacent surveyed lands, has no jurisdiction to survey, as omitted areas, small tracts of lands outside the meander line of the original surveys about the margins of lakes and streams, which were narrow strips or shifting sand bars, towheads, or other unsubstantial areas, considered of little value at the time of survey. .... 381
3. A private survey made for the purpose of marking on the ground a theoretical line, platted but not run by the Government, where executed within the allowable departure from cardinal course, and relied upon by an owner under title passed by the United States in the placing of improvements upon the patented land, will not be disturbed, but it will be adopted by the Government as a boundary for closure of the survey of the adjoining public land. .... 402

**Survey—Continued.**

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4. Where an oil and gas prospecting permit is issued for unsurveyed lands, the survey required by section 14 of the leasing act, when discovery is made, need not conform strictly to the rectangular surveys adopted under the general laws governing public-land surveys, but may be so made as to preserve the exterior boundaries of the claim.----- 618

5. The provision in section 14 of the act of February 25, 1920, that unsurveyed lands covered by a prospecting permit be surveyed at the expense of the permittee before a lease is awarded as a result of a discovery of oil or gas, authorizes the Secretary of the Interior to prescribe the rules and regulations to govern the making of such surveys without regard to the general laws under which public-land surveys are made.----- 618

6. Where a survey was fraudulent or grossly inaccurate in that it purported to bound tracts of public lands upon a body of water, when in fact no such body of water existed at or near the meander line, the false meander line and not an imaginary line to fill out the fraction of the normal subdivision marks the limits of the grant of a lot abutting thereon, and, upon discovery of the mistake, the Government may survey and dispose of the omitted area as a part of the public domain.----- 679

7. A survey which sets apart as a unit a tract of land for a forest homestead entry, does not supersede the township survey if the land thereafter becomes subject to appropriation, but it may be subsequently entered by legal subdivisions in accordance with the township plat.----- 686

**Taxation.**

See *Indian Lands*, 11; *Vested Rights*, 3.

**Tax Sale.**

See *Warrant*, 3.

**Telephone Lines.**

See *Right of Way*, 1; *Timber Cutting*, 1.

**Territorial Legislature.**

See *Officers*, 3.

**Tide Lands.**

See *Indian Lands*, 7.

**Timber and Stone.**

See *Land Department*, 2; *Repayment*, 19.

1. The act of June 22, 1910, which authorizes entries under certain nonmineral land laws of the surface of lands, withdrawn or classified as valuable for coal, does not include either expressly or by implication entries under the timber and stone act.----- 342

2. The act of March 3, 1909, the purpose of which was to preserve the surface claims of persons who had made locations, selections, or entries under the nonmineral land laws for lands thereafter classified, claimed, or reported as valuable for coal, is broad enough, both in its terms and intent, to embrace entries under the timber and stone act, subject to the reservations specified in the act of 1909.----- 342

**Timber and Stone—Contd.**

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3. Until the determination by the Department that land applied for under the timber and stone act is subject to entry thereunder, and an appraisal has been made, no contract status exists between the Government and the applicant.----- 342

4. The requirement that a timber and stone applicant must, within thirty days from service of notice, deposit with the receiver the appraised price of the land, is a departmental regulation which may be waived where good faith has been manifested and its literal enforcement would work hardship not rendered necessary by any public need.----- 425

**Timber Cutting.**

See *Damages*, 2; *National Forests*, 2; *Payment*, 2; *Words and Phrases*, 14.

1. While the act of March 4, 1911, which grants rights of way over the public lands for telephone, telegraph, and transmission lines, does not expressly authorize the cutting of timber from a right of way, yet such right must be implied as a necessary incident to the right of use and occupancy of the easement.----- 608

2. A grantee under the act of March 4, 1911, who cuts timber from lands within its right of way necessary for the construction and operation of the line, becomes, upon payment for the timber, the owner thereof, with full authority to dispose of it as it chooses.----- 608

**Timber Lands.**

See *Indian Lands*, 8; *National Forests*, 2; *Oregon and California Railroad Lands*, 1.

**Timber Sale.**

See *Indian Lands*, 8; *Oregon and California Railroad Lands*, 1; *Timber Cutting*, 2.

**Timber Trespass.**

See *Damages*, 1, 2.

**Town Site.**

See *Indian Lands*, 5.

1. The unappropriated lands within the town sites created pursuant to the act of March 20, 1906, in the Kiowa, Comanche, and Apache Indian Reservations in Oklahoma, are subject to disposition only in accordance with the terms of that act and Congressional legislation is necessary to effect their restoration to disposition in any other manner. 189

2. Should Congress authorize the restoration of the unappropriated lands within the town sites in the Kiowa, Comanche, and Apache Indian Reservations in Oklahoma, one filing an application to purchase or enter any of those lands prior to such restoration would not acquire a preference right under such application unless the act authorizing the restoration should so expressly provide. 189

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<b>Trade and Manufacturing Site.</b>		<b>Vested Rights—Continued.</b>	
1. Under the principle <i>de minimis non curat</i> <i>lez</i> , the right to acquire a trade and manufac- turing site in Alaska under section 10 of the act of May 14, 1898, which specifies that one claim only may be purchased by any one person, association, or corporation, will not be denied to a corporation merely because a minority interest of its stock is owned by stock- holders who are also holders of minority stock in another corporation that had acquired title to public lands under that act.....	334	3. The United States is not divested of its equitable title to public land until there has been a full compliance with all the conditions upon which the right to title depends, and, prior to that time, a tax imposed upon the land by a State is void.....	486
2. A regulation issued pursuant to section 10 of the act of May 14, 1898, requiring, in connection with an application for a trade and manufacturing site in Alaska by an asso- ciation or corporation, a showing that each member thereof has not entered or acquired title to any land under the act, does not ex- ceed the requirements of the act, and is valid.	334	4. The time of the submission of final proof upon a homestead entry showing full compli- ance with all the requirements of law, if unre- futed, and the payment of the requisite fees and commissions, marks the vesting in the entryman of equitable title to the land, re- gardless of any change as to its character that may thereafter be discovered before examina- tion and approval of the proof by the General Land Office.....	664
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<b>Trap Rock.</b>		1. A waiver of a legal right is an intentional foregoing of the exercise of that right, and where the question arises as to whether silence or failure to act constitutes a construc- tive waiver, the conduct of the one on the part of whom the waiver is imputed may be considered in determining that point.....	406
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<b>United States Commissioner.</b>		1. By section 2415, Revised Statutes, the location of a military bounty land warrant was restricted to legal subdivisions of public lands of the United States, subject to private entry.....	438
See <i>Officers</i> , 4.		2. Where the records of the General Land Office fail to show that the locator of a military bounty land warrant complied with the re- quirements of the regulations relating to the location thereof, no presumption will arise that such location was perfected so as to vest equitable title to the located land in the locator.....	486
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1. Failure of a selector to fulfil, prior to the attachment of a withdrawal, an additional requirement imposed upon him by amended regulations, will not defeat a selection if, at the time of its acceptance by the local officers, there had been full compliance with the law and all existing applicable departmental regulations.....	9		
2. Until all fees and commissions required by law have been paid, a vested right does not attach under an application to make a soldiers' additional entry pursuant to section 2306, Revised Statutes, and therefore the sub- mission of proof upon such application does not, in the absence of the payment of the fees and commissions, bar an inquiry relating to the mineral character of the land as of a date subsequent to the submission of the proof.....	326		

# Water Right.

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See *Desert Land*, 5; *Homestead*, 10, 15; *Mining Claim*, 12, 16; *Payment*, 1; *Power Sites*, 1; *Reclamation*, 1, 3-7; *Repayment*, 5; *Right of Way*, 2; *Supervisory Authority*, 3.

1. Where one, by the construction of a tank upon a tract of public land, acquires a vested right to use water by section 2339, Revised Statutes, and is in possession of the surrounding land, he will be accorded a preference right to acquire title to the land upon which his improvements are situated under an appropriate land law as against another who has been allowed to make an entry under the stock-raising homestead act. 355

# Widow; Heirs; Devisee.

See *Carey Act*, 1.

# Withdrawal.

See *Coal Lands*, 5, 6; *Desert Land*, 7; *Homestead*, 2, 11; *Mineral Lands*, 6; *Mining Claim*, 7; *Oil and Gas Lands*, 2, 6, 34, 47; *Patent*, 8; *Reclamation*, 9, 10, 11; *Repayment*, 3, 5-9, 19; *Reservation*, 3; *School Land*, 4-8; *Settlement*, 1; *Timber and Stone*, 1; *Vested Rights*, 1.

1. A coal land withdrawal does not defeat a selection made by the Northern Pacific Railway Company pursuant to section 3 of the act of March 2, 1899, which authorized the exchange of its lands within the Mount Rainier National Park for unreserved, unappropriated, nonmineral lands elsewhere, where the company elects to take subject to the provisions of the act of March 3, 1909, and the lands are nonmineral in character except as to their coal contents. 146

2. The practice of withdrawing lands contemplates their segregation for purposes of investigation, and it is clearly the duty of the Land Department to seek such withdrawals whenever from evidence before it an inference or belief is warranted that lands are in fact mineral. 231

3. A petroleum withdrawal prior to the act of February 25, 1920, of unproven lands for the purpose of classification was not extinguished by the passage of that act, inasmuch as the prospecting for oil and gas thereunder was intended merely as preliminary to leasing and not as a method of disposal, they being only subject to lease upon discovery of their value for mineral deposits. 231

4. A withdrawal under the act of June 25, 1910, is, in its nature, a continuing withdrawal which, although not attaching to land that at date of withdrawal was within a valid existing claim, attaches immediately upon default of the claimant thereafter. 262

5. A report by the Geological Survey that land is prospectively valuable for oil or gas is, as to its effect upon a subsequent nonmineral entry, tantamount to a withdrawal, and administrative delay by the Government in following up the report with a withdrawal or classification of the land until after an entry had been allowed and compliance with the homestead law completed, does not relieve the entryman from fulfillment of the requirements of the act of July 17, 1914. 289

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6. A temporary withdrawal made prior to classification or reservation merely for withholding the land from disposition under the public land laws until further investigation can be made and a decision rendered as to the character of the land does not raise the presumption that the land is mineral nor does it dedicate it to any special purpose. 516

7. All withdrawals and reservations in effect when the plat of survey of a granted school section is accepted defeat, at least temporarily, the grant to the State which has the right to delay the selection of indemnity to such time as it may see fit, but if the withdrawal or reservation is vacated prior to the filing of an indemnity selection the State must take the land in place. 628

8. A first-form withdrawal by the Secretary of the Interior under authority of the act of June 17, 1902, of lands, which, in his judgment, are required for irrigation works, is effective to preclude thereafter location under the mining laws of lands within the designated limits. 688

# Witnesses.

See *Practice*, 6.

# Words and Phrases.

1. In construing a statute it is permissible to substitute the word "and" for the word "or" when found necessary to do so in order to impart the true legislative intent as gathered from the context and the circumstances attending its enactment. 153

2. The term "association" usually means an unincorporated organization composed of a body of persons, banded together for some particular purpose, partaking in its general form and mode of procedure of the characteristics of a corporation. 139

3. For the construction of the term "erroneously allowed" within the contemplation of section 2 of the repayment act of June 16, 1880, see *Repayment*, 4, 19; *Statutes*, 3, 14.

4. In coupling the expression "can not be confirmed" with the term "erroneously allowed," as those phrases are used in section 2 of the act of June 16, 1880, which authorized repayment where an entry was "erroneously allowed and can not be confirmed," the law necessarily contemplated an entry with reference to which the defect could not be cured. 161

5. The term, "valid claims" as used in section 37 of the act of February 25, 1920, relates to unperfected claims to mineral lands and does not contemplate a completed grant of nonmineral lands to a State in aid of its common schools. 231

6. The word "herein," as used in the exception clause of section 27 of the act of February 25, 1920, has reference to the leasing act as a whole and not merely to the section in which it is used. 294

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7. The term "navigable waters" is defined by the act of May 14, 1898, to include all tidal waters up to the line of ordinary high tide and all nontidal waters navigable in fact up to the line of high-water mark..... 79
8. The term "or other waters," as used in the act of March 3, 1903, includes all waters of sufficient magnitude to require meandering under the Manual of Surveys, or which are used as a passageway or for spawning purposes by salmon or other sea-going fish..... 80
9. The term "past production" as used in section 35 of the leasing act has particular reference to cases arising under section 18 of that act, where relief is authorized upon payment to the Government for the minerals produced prior to application for relief, and it has no applicability to coal production..... 501
10. For construction of the term "reasonably compact form," as used in section 13 of the act of February 25, 1920, see *Oil and Gas Lands*, 38; *Statutes*, 8.....
11. For construction of the term "shall be in compact form," as used in section 14 of the act of February 25, 1920, see *Oil and Gas Lands*, 45; *Statutes*, 13.....

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12. A temporary withdrawal made with the view to classification and appraisal of land for its coal contents does not constitute a "reservation" within the meaning of the proviso to section 6 of the enabling act of July 16, 1904, granting public lands to the State of Utah for school purposes..... 516
13. The phrase "shore line," as used in section 10 of the act of May 14, 1898, means the high-water line..... 81
14. The term "full value," as used in the departmental regulations of January 6, 1913, relating to payment for timber cut on public lands in the construction, maintenance, and operation of lines for which rights of way are granted pursuant to the act of March 4, 1911, is to be construed as meaning the entire stumpage value of the standing trees..... 608
15. For the construction of the term "valuable for" with reference to minerals as used in the act of July 17, 1914, see *Reservation*, 1; *Statutes*, 6.....

## Zion National Park.

See *National Parks*, 1.